134-291

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1354.

JOSEPH BANIGAN, PLAINTIFF IN ERROR,

vs.

CHARLES BARD, RECEIVER OF THE HAYWARD RUBBER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED OCTOBER 14, 1889.

accession 23919

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 29, 1889

1 Circuit Court of the United States for the District of Connecticut.

CHARLES BARD, Receiver of The Hayward Rubber Company,
vs.
JOSEPH BANIGAN.

To the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut:

The petition of Joseph Banigan, defendant in the above-entitled action, respectfully represents that said defendant is aggrieved by the final judgment rendered against this defendant in said action, and is informed that there is error therein to his prejudice, and he desires a writ of error be allowed therefrom to the Supreme Court of the United States.

Wherefore the defendant prays that a writ be allowed, returnable to the next term of the Supreme Court of the United States.

Dated at New Haven, this 26th day of August, 1889.

JOSEPH BANIGAN,
By DOOLITTLE & BENNETT,
His Attorneys.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court for the district of Connecticut, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, between Charles Bard, receiver of the Hayward Rubber Company, and Joseph Banigan, a manifest error hath happened, to the great damage of the said Joseph Banigan, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, 1889, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of Circuit Court, Connecticut.]

E. E. MARVIN, *Clerk.*

Allowed by—
N. SHIPMAN,
One of the Judges of the Circuit Court.
1—1354

3 Supreme Court of the United States.

Circuit Court of the United States, District of Connecticut.

CHARLES BARD, Receiver of The Hayward Rubber Company,
vs.
JOSEPH BANIGAN.

Know all men by these presents that we, Joseph Banigan, of the city of Providence, in the State of Rhode Island, and Walter S. Ballou, of the city of Providence, in the State of Rhode Island, and William L. Bennett, of New Haven, Conn., are held and firmly bound unto Charles Bard, of the city of Norwich, in the county of New London and State of Connecticut, receiver of the Hayward Rubber Company, a corporation organized under and by virtue of the laws of the State of Connecticut and located in the town of Colchester, in said New London county, in the sum of five hundred dollars, to be paid unto said Charles Bard, receiver, his successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 26th day of August, 1889.

Whereas the above-named Joseph Banigan has presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Connecticut:

Now, therefore, the condition of this obligation is such that if the said Joseph Banigan should prosecute his said writ of error
4 to effect and assume and pay all costs if he shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOSEPH BANIGAN. [SEAL.]
WALTER S. BALLOU. [SEAL.]
WILLIAM L. BENNETT. [SEAL.]

Approved Sept. 25th, 1889, by—
N. SHIPMAN,
District Judge and one of the Judges of the Circuit Court.

5 UNITED STATES OF AMERICA, *ss:*

To Charles Bard, of the town of Norwich, in the county of New London and State of Connecticut, receiver of the Hayward Rubber Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Connecticut, wherein Joseph Banigan, of the city of Providence, in the State of Rhode Island, is plaintiff

and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathaniel Shipman, judge of the district court of the United States, this 25th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of Circuit Court, Connecticut.]

N. SHIPMAN,
One of the Judges of the Circuit Court.

NORWICH, CONN., *Sept.* 26, 1889.

Due & lawful service of the foregoing writ & of the writ of error mentioned therein is accepted & acknowledged.

HALSEY & BRISCOE,
Attorneys for Plaintiff.

6 The answer of the judges of the circuit court of the United States for the district of Connecticut to the foregoing writ.

The record and process whereof mention is therein made follow in these words, to wit:

CHARLES BARD, Receiver of The Hayward Rubber Company,
vs.
JOSEPH BANIGAN.

Be it remembered that on the 11th day of September, 1888, there was filed in court a transcript of record of a cause which was removed from the superior court for New London county, and which is in the words and figures following, viz:

7 To the sheriff of the county of New London, his deputy; to the sheriff of Fairfield county, his deputy; to the sheriff of the county of New Haven, his deputy; to the sheriff of the county of Hartford, his deputy; to the sheriff of the county of Middlesex, his deputy, and to the sheriff of the county of Windham, his deputy, or either constable of the town of Norwich, in said county, Greeting:

By authority of the State of Connecticut you are hereby commanded to attach, to the value of fifty thousand dollars, the goods or estate of Joseph Banigan, of Providence, in the State of Rhode Island, and him summon to appear before the superior court in and for the county of New London on the first Tuesday of September, 1888, then and there to answer unto Charles Bard, of Norwich, in said New London county, as he is receiver of the Hayward Rubber Company, a corporation located at Colchester, in said New London county, in a civil action wherein the plaintiff complains and says:

First Count.

1. On and before June 1, 1888, the plaintiff lent $50,000 to the defendant.

2. And paid, laid out, and expended said sum for the defendant.

3. And sold and delivered goods, wares, and merchandise of the price and value of said sum to the defendant.

4. And bargained and sold goods, wares, and merchandise of the price and value of said sum to the defendant.

5. And performed work of the price and value of said sum for the defendant.

6. And furnished materials of the price and value of said sum to the defendant.

7. And furnished board and lodging, washing, fuel, and other articles of the price and value of said sum to the defendant.

8. And furnished horses, harnesses, carriages, vehicles, and other property of the plaintiff to the defendant for his use for said sum.

9. And on said day the defendant had and received said sum to and for the use of the plaintiff.

10. And used and occupied certain lands of the plaintiff by his their permission, which use and occupation were reasonably worth said sum.

11. And said sum was found to be due to the plaintiff from the defendant on account then and there stated between them.

12. Yet, though said sums are justly due to the plaintiff from the defendant, the defendant has never paid the same.

The plaintiff claims $50,000 damages.

And you are hereby further commanded to leave a true and attested copy of this writ, and of the accompanying complaint, at least twelve days before the session of the court to which it is made returnable, with —— —— or at his their usual place of abode, as he is they are the agent, trustee, and debtor of said defendant, and has have concealed in his their hands the goods, effects, and estate of said defendant, and is are indebted to him them.

And you are further commanded to summon said —— —— to appear before said court at the time and place first mentioned, then and there to disclose on oath whether he has they have concealed in his their hands the goods, effects, or estate of said defendant, or is are indebted to him them.

Charles Bard, of Norwich, is recognized in $10 to prosecute, &c.

Of this writ, with your doings thereon, make due return. Dated at Norwich, this 7th day of June, 1888.

WILLIS A. BRISCOE,
Justice of the Peace.

New Haven County, *ss:*

New Haven, Conn., *July 2d*, 1888.

Then and there, by virtue hereof, and by the special direction of Willis A. Briscoe, plaintiff's attorney, I read this writ, summons, and complaint in the presence and hearing of the within-named defendant.

And on the same 2d day of July, 1888, I left with and in the hands of the within-named defendant a true and attested copy of

the within writ, summons, and complaint, with my said doings thereon endorsed.

Attest:

FRANK HAWKINS,
Sheriff of New London County and
Sheriff's Deputy of New Haven County.

Fees:

Travel	$19 50
Copies	50
Indorsement	24
Service	12
	20 36

10 In the Superior Court, County of New London and State of Connecticut.

CHARLES BARD, Receiver, of Norwich, State of Connecticut,
vs.
JOSEPH BANIGAN, of Providence, State of Rhode Island.

Petition for Removal of Cause to the Circuit Court of the United States.

To the honorable superior court for the county of New London, in the State of Connecticut, now in session in New London:

The petition of said Joseph Banigan respectfully represents that the above-entitled suit is now pending in this court, and is a suit of a civil nature, at law or in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; that there is a controversy in said suit between said Charles Bard, receiver, plaintiff, and said Joseph Banigan, defendant, citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid.

That your petitioner, the said Joseph Banigan, is the defendant in said suit and controversy, and was at the time when said suit was commenced and still is a citizen of the State of Rhode Island, and was not at the time said suit was commenced and is not now a resident of the State of Connecticut. Charles Bard, as receiver, is the plaintiff in said suit and controversy and was at the time when said suit was commenced and still is a citizen of the State of
11 Connecticut, and that the Hayward Rubber Company, of which corporation he is receiver and as such receiver brings the action, is a corporation organized under the laws of the State of Connecticut, and is located at Colchester, in said State of Connecticut, and that your petitioner desires to remove said suit and controversy from said superior court to the circuit court of the United States, at its session next hereafter to be held, in the district of Connecticut.

Therefore your petitioner now makes and files this his petition in said State court before the defendant in said suit and controversy is required by the laws of the said State or the rule of said State court to answer or plead to the said declaration or complaint of the

said plaintiff, and herewith files a bond with good and sufficient surety for his entering in such circuit court of the United States, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in such suit if special bail was originally requisite therein, and further conditioned as required by the statutes and laws of the United States.

And your petitioner respectfully prays this honorable court to accept said petition and bond with surety, and to proceed no further in such suit, and prays for the removal of said cause, controversy,
12 and record in said cause from this court into the circuit court of the United States at its session next to be held in said district as aforesaid.

Dated at New Haven, this 4th day of September, 1888.

JOSEPH BANIGAN,
By T. E. DOOLITTLE,
His Attorney.

Order of Removal of Cause.

STATE OF CONNECTICUT:

Superior Court, New London County, 4th day of September, A. D. 1888.

CHARLES BARD, Rec.,
vs.
JOSEPH BANIGAN.

Upon the filing and reading of the foregoing petition for the removal of said above-entitled cause and of the bond of George T. Doolittle, as principal, and Tilton E. Doolittle, as surety, filed herewith, and on motion of T. E. Doolittle, Esquire, attorney for said petitioner, it is hereby—

Ordered, That the said petition and bond be, and they hereby are, accepted, and that this court will proceed no further in said suit, but that the same may be removed into the circuit court of the United States next to be held in the district of Connecticut, in the manner provided by the laws of the United States.

By the court: JOHN C. AVERILL, *Clerk.*

13 *Bond of Removal of Cause.*

Know all men by these presents that Mr. George T. Doolittle, of the town of New Haven, in the county of New Haven and State of Connecticut, as principal, and Tilton E. Doolittle, of the town of New Haven, in the county of New Haven and State of Connecticut, as surety, are held and firmly bound, jointly and severally, unto Charles Bard, of the town of Norwich, in the county of New London

and State of Connecticut, in the sum of two hundred and fifty dollars, to be paid to the said Charles Bard, his attorney, executor, administrator, successors, or assigns; for which payment, well and truly to be made, we hereby bind ourselves and each of us, our heirs, successors, executors, and administrators and each of them, firmly by these presents.

Sealed with our seals and dated at New Haven this 4th day of September, A. D. 1888.

The condition of the foregoing obligation is such that whereas Joseph Banigan, of the town and city of Providence, county of Providence and State of Rhode Island, having, in accordance with the laws of the United States, filed in the superior court for the county of New London, in the State of Connecticut, his petition for the removal of a certain suit and controversy therein pending, wherein said Charles Bard, as receiver of the Hayward Rubber Company, is plaintiff and said Joseph Banigan is defendant, to the circuit court of the United States for the district of Connecticut:

Now, therefore, if the said petitioner shall enter in such circuit — for the district of Connecticut, on the first day of its session
14 next to be held in said district of Connecticut after the filing of said petition, a copy of the record in such suit, and shall appear in such circuit court, and shall pay all costs that may be awarded by the said circuit court of the United States if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall do or cause to be done such other and appropriate acts as by the act of March 3, 1887, and other acts of Congress are required to be done on the removal of a suit, then the above obligation shall be void; otherwise in full force.

GEORGE T. DOOLITTLE. [L. S.]
TILTON E. DOOLITTLE. [L. S.]

STATE OF CONNECTICUT, }
New Haven County, } *ss:*

NEW HAVEN, *Sept. 4th, A. D.* 1888.

Tilton E. Doolittle, the above-named surety, being duly sworn, deposes and says that he resides in the town of New Haven, in the county of New Haven and State of Connecticut, and is worth the sum of not less than five hundred dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy of execution.

Subscribed and sworn to at the time and place above stated before me—

JONATHAN INGERSOLL,
Commissioner of the Superior Court for New Haven County.

15 STATE OF CONNECTICUT, }
New London County, Norwich, } *ss:*

OFFICE OF THE CLERK OF THE SUPERIOR COURT.

I, John C. Averill, clerk of said court, do hereby certify that the

	By interest on note No. 910 from Oct. 21 to Dec. 15, '87		11 00	
	21. " note of Hayward Rubber Co., endorsed by L. Blackstone, dated June 4, '87, 4 mos., paid by Joseph Banigan		20,000 00	
	" interest from Oct. 7 to Dec. 21, '87		243 33	
	Am'ts carr'd forw'd		110,592 88	236,912 65
20	Am'ts bro't forw'd		110,592 88	236,912 65

CR.

By the following payments made to the Woonsocket Rubber Co. by Jos. Banigan for ⅝ H. R. Co.:

1887.				
July 13.	Cash	20,000		
Dec. 17.	"	40,000		
1888.				
Jan'y 5.	Notes	3,431 65		
" 6.	Cash	9,872 36		
			73,304 01	
	" commissions		10,000 00	
				193,896 89
				43,015 76

CHARLES BARD, *Receiver*,
By J. HALSEY, *His Att'y.*

And on the 22d day of November, 1888, defendant's answer, set-off, and bill of particulars were filed in the words and figures following, viz:

21 Circuit Court of the United States, District of Connecticut.
September Term, 1888.

CHARLES BARD, Receiver of The Hayward Rubber Company, Plaintiff,
vs.
JOSEPH BANIGAN, Defendant.

Defendant's Answer and Set-off to Substituted Complaint.

1. The defendant denies the truth of the matters contained in the plaintiff's complaint.

By way of set-off and counter-claim—

First.

1. On and before August 10th, 1887, the defendant lent the said Hayward Rubber Company the sum of $250,000.00.

2. And paid, laid out, and expended said sum for said corporation.

3. And performed work and services of the price and value of said sum for the said corporation.

4. And on said day the said corporation had and received said sum to and for the use of the defendant.

5. And on said day said sum was due to the defendant from said

corporation as commissions earned by the defendant in the sale of goods for the corporation at its request, yet, though said sums are justly due to the defendant, neither the said The Hayward Rubber Company nor the plaintiff, as receiver of said company, has ever paid the same.

22 At the time of the commencement of this action the plaintiff was and still is indebted to the defendant in the sum of $100,000.00—

1. For so much money paid, laid out, and expended by the defendant for the plaintiff at his special instance and request; and

2. For work and services done and performed by the defendant for the plaintiff at his special instance and request; and

3. For commissions earned by the defendant in the sale of goods for the plaintiff at his special instance and request.

The defendant offers to set off the said debts against the demands set out in the complaint, if any should be found to exist, and claims judgment for such balance as may be found to be due him from the plaintiff or the said The Hayward Rubber Company on said account.

By DOOLITTLE & BENNETT,
Att'ys for Defendant.

23 *Bill of Particulars under Set-off and Counter-Claim.*

Joseph Banigan in account with the Hayward Rubber Company and Charles Bard, receiver.

DR.

	To mdse. sold for account of the Hayward Rubber Co., $654,459.66	235,793 55	
'87.			
Aug. 29.	" cash from the Hayward Rubber Co. to pay freight	107 88	
	" interest on collections	1,273 80	
'88.			
Sept. 1.	" profit and loss	4 64	
			237,179 87

CR.

'87.			
Dec. 21.	By liquidation of the following notes for which the goods were held as collateral security:		
	Note of H. R. Co., dated April 1, '87, 4 mos	6,400	
	Note of H. R. Co., dated April 1, '87, 4 mos	15,165	
	Note of H. R. Co., dated April 1, '87, 4 mos	10,000	

By interest on note No. 910 from Oct. 21 to Dec. 15, '87		11 00	
21. " note of Hayward Rubber Co., endorsed by L. Blackstone, dated June 4, '87, 4 mos., paid by Joseph Banigan		20,000 00	
" interest from Oct. 7 to Dec. 21, '87		243 33	
Am'ts carr'd forw'd		110,592 88	236,912 65
20 Am'ts bro't forw'd		110,592 88	236,912 65

CR.

By the following payments made to the Woonsocket Rubber Co. by Jos. Banigan for % H. R. Co.:

1887.				
July 13.	Cash	20,000		
Dec. 17.	"	40,000		
1888.				
Jan'y 5.	Notes	3,431 65		
" 6.	Cash	9,872 36		
			73,304 01	
" commissions			10,000 00	
				193,896 89
				43,015 76

CHARLES BARD, *Receiver*,
By J. HALSEY, *His Att'y.*

And on the 22d day of November, 1888, defendant's answer, set-off, and bill of particulars were filed in the words and figures following, viz:

21 Circuit Court of the United States, District of Connecticut.
September Term, 1888.

CHARLES BARD, Receiver of The Hayward Rubber Company, Plaintiff,
vs.
JOSEPH BANIGAN, Defendant.

Defendant's Answer and Set-off to Substituted Complaint.

1. The defendant denies the truth of the matters contained in the plaintiff's complaint.

By way of set-off and counter-claim—

First.

1. On and before August 10th, 1887, the defendant lent the said Hayward Rubber Company the sum of $250,000.00.

2. And paid, laid out, and expended said sum for said corporation.

3. And performed work and services of the price and value of said sum for the said corporation.

4. And on said day the said corporation had and received said sum to and for the use of the defendant.

5. And on said day said sum was due to the defendant from said

corporation as commissions earned by the defendant in the sale of goods for the corporation at its request, yet, though said sums are justly due to the defendant, neither the said The Hayward Rubber Company nor the plaintiff, as receiver of said company, has ever paid the same.

22 At the time of the commencement of this action the plaintiff was and still is indebted to the defendant in the sum of $100,000.00—

1. For so much money paid, laid out, and expended by the defendant for the plaintiff at his special instance and request; and

2. For work and services done and performed by the defendant for the plaintiff at his special instance and request; and

3. For commissions earned by the defendant in the sale of goods for the plaintiff at his special instance and request.

The defendant offers to set off the said debts against the demands set out in the complaint, if any should be found to exist, and claims judgment for such balance as may be found to be due him from the plaintiff or the said The Hayward Rubber Company on said account.

By DOOLITTLE & BENNETT,
Att'ys for Defendant.

23 *Bill of Particulars under Set-off and Counter-Claim.*

Joseph Banigan in account with the Hayward Rubber Company and Charles Bard, receiver.

DR.

	To mdse. sold for account of the Hayward Rubber Co., $654,459.66	235,793	55	
'87.				
Aug. 29.	" cash from the Hayward Rubber Co. to pay freight	107	88	
	" interest on collections	1,273	80	
'88.				
Sept. 1.	" profit and loss	4	64	
				237,179 87

CR.

'87.			
Dec. 21.	By liquidation of the following notes for which the goods were held as collateral security:		
	Note of H. R. Co., dated April 1, '87, 4 mos.	6,400	
	Note of H. R. Co., dated April 1, '87, 4 mos.	15,165	
	Note of H. R. Co., dated April 1, '87, 4 mos.	10,000	

	By interest on note No. 910 from Oct. 21 to Dec. 15, '87		11 00	
	21. " note of Hayward Rubber Co., endorsed by L. Blackstone, dated June 4, '87, 4 mos., paid by Joseph Banigan		20,000 00	
	" interest from Oct. 7 to Dec. 21, '87		243 33	
	Am'ts carr'd forw'd		110,592 88	236,912 65
20	Am'ts bro't forw'd		110,592 88	236,912 65

CR.

	By the following payments made to the Woonsocket Rubber Co. by Jos. Banigan for % H. R. Co.:			
1887.				
July 13.	Cash	20,000		
Dec. 17.	"	40,000		
1888.				
Jan'y 5.	Notes	3,431 65		
" 6.	Cash	9,872 36		
			73,304 01	
	" commissions		10,000 00	
				193,896 89
				43,015 76

CHARLES BARD, *Receiver*,
By J. HALSEY, *His Att'y.*

And on the 22d day of November, 1888, defendant's answer, set-off, and bill of particulars were filed in the words and figures following, viz:

21 Circuit Court of the United States, District of Connecticut.
September Term, 1888.

CHARLES BARD, Receiver of The Hayward Rubber Company, Plaintiff,
vs.
JOSEPH BANIGAN, Defendant.

Defendant's Answer and Set-off to Substituted Complaint.

1. The defendant denies the truth of the matters contained in the plaintiff's complaint.

By way of set-off and counter-claim—

First.

1. On and before August 10th, 1887, the defendant lent the said Hayward Rubber Company the sum of $250,000.00.

2. And paid, laid out, and expended said sum for said corporation.

3. And performed work and services of the price and value of said sum for the said corporation.

4. And on said day the said corporation had and received said sum to and for the use of the defendant.

5. And on said day said sum was due to the defendant from said

corporation as commissions earned by the defendant in the sale of goods for the corporation at its request, yet, though said sums are justly due to the defendant, neither the said The Hayward Rubber Company nor the plaintiff, as receiver of said company, has ever paid the same.

22 At the time of the commencement of this action the plaintiff was and still is indebted to the defendant in the sum of $100,000.00—

1. For so much money paid, laid out, and expended by the defendant for the plaintiff at his special instance and request; and

2. For work and services done and performed by the defendant for the plaintiff at his special instance and request; and

3. For commissions earned by the defendant in the sale of goods for the plaintiff at his special instance and request.

The defendant offers to set off the said debts against the demands set out in the complaint, if any should be found to exist, and claims judgment for such balance as may be found to be due him from the plaintiff or the said The Hayward Rubber Company on said account.

By DOOLITTLE & BENNETT,
Att'ys for Defendant.

23 *Bill of Particulars under Set-off and Counter-Claim.*

Joseph Banigan in account with the Hayward Rubber Company and Charles Bard, receiver.

DR.

	To mdse. sold for account of the Hayward Rubber Co., $654,459.66	235,793 55	
'87.			
Aug. 29.	" cash from the Hayward Rubber Co. to pay freight	107 88	
	" interest on collections	1,273 80	
'88.			
Sept. 1.	" profit and loss	4 64	
			237,179 87

CR.

'87.			
Dec. 21.	By liquidation of the following notes for which the goods were held as collateral security:		
	Note of H. R. Co., dated April 1, '87, 4 mos	6,400	
	Note of H. R. Co., dated April 1, '87, 4 mos.	15,165	
	Note of H. R. Co., dated April 1, '87, 4 mos.	10,000	

	Note of H. R. Co., dated April 1, '87, 4 mos.	9,000		
	Interest on above from Aug. 4th to Dec. 15th	899	32	
	Protest fees	6	00	
	Note of H. R. Co., dated June 4, '87, 4 mos.	15,000		
24	Amount bro't forward	56,470	32	237,179 87
	Interest from Oct. 7 to Dec. 15th	172	50	
	Note of H. R. Co., dated July 8, '87, 4 mos.	25,000		
	Interest from Nov. 11, '87, to Dec. 15th	141	67	
	Note of H. R. Co., dated Mar. 5, '87, 5 mos.	3,130	33	
	Note of H. R. Co., dated Mar. 5, '87, 4 mos.	2,564	06	
	Note of H. R. Co., dated April 12, '87, 4 mos.	1,500		
	Note of H. R. Co., dated July 18, '87, 3 mos.	1,200		
	Interest on above notes, respectively	67 59 30 11	34 83 50	
	Protest fees	2		
	Note of H. R. Co., endorsed by Lorenzo Blackstone, dated June 4, '87, 4 mos., paid by Jos. Banigan	20,000		
	Interest from Oct. 7th to Dec. 21st	243	33	
'87.				
July 13.	By cash paid Woonsocket Rubber Co.	20,000		
Dec. 17.	cash paid Woonsocket Rubber Co.	40,000		
'88.				
Jan'y 5.	cash paid Woonsocket Rubber Co.	3,431	65	
" 6.	cash paid Woonsocket Rubber Co.	9,872	36	
25	Amount bro't forward	183,896	89	237,179 87
'88.				
June 1.	By interest on insurance, rent, &c.	26	69	
	" freight, rent, and insurance	5,255	86	
	" interest allowed customers	565	64	
	" services as gen'l manager	21,808	40	

By travelling expenses	1,193	
" commissions	11,736 03	
		234,482 31
		$12,697 56

'85.

April 2. By money had and received by the Hayward Rubber Co. to and for the use of the defendant, being a sum of $17,500.00 advanced by said defendant to said company on account of certain preferred stock in said company thereafter to be created and issued to him, which said stock was never created or issued ---------- $17,500 00

By interest on said sum from April 2, '85, to date ----------

And on the 2d day of February, 1889, plaintiff's answer to defendant's set-off and counter-claim was filed in the words and figures following, viz:

26 Circuit Court of the United States, District of Connecticut.
September Term, 1888.

CHARLES BARD, Receiver of The Hayward Rubber Company, Plaintiff,
vs.
JOSEPH BANIGAN, Defendant.

Plaintiff's Answer to Defendant's Set-off and Counter-claim.

First.

1. The plaintiff denies the truth of the matters contained in the first count of the defendant's set-off and counter-claim, except so far as the same is admitted in the plaintiff's substituted complaint and the bill of particulars thereto annexed.

Second.

1. The plaintiff denies the truth of the matters contained in the second count of the defendant's set-off and counter-claim, except so far as the same is admitted in the plaintiff's substituted complaint and the bill of particulars thereto annexed.

PLAINTIFF,
By J. HALSEY, *His Att'y.*

And on the 19th day of April, 1889, stipulation to try issue to court was filed in the words and figures following, viz:

27 United States Circuit Court, District of Connecticut.

CHARLES BARD, Receiver,
vs.
JOSEPH BANIGAN.

It is stipulated and agreed that the issues in this cause shall be tried by the court instead of by jury.

J. HALSEY AND W. A. BRISCOE,
Att'ys for Plaintiff.
DOOLITTLE AND BENNETT,
Att'ys for Def't.

Whereupon, the said parties being fully heard, with their witnesses and counsel, upon the premises aforesaid, the said cause having come thereto by regular continuances, the said parties appearing as aforesaid, the court, on the 17th day of June, 1889, filed his finding of facts and decision in the words and figures following, viz:

28 Circuit Court of the United States for the District of Connecticut.

CHARLES BARD, Receiver of Hayward Rubber Company,
vs.
JOSEPH BANIGAN.

SHIPMAN, *J.:*

This is an action at law, which was tried by the court, the parties having by a duly signed written stipulation waived a jury trial and agreed to a trial by the court. The first count of the complaint was for money had and received by the defendant for the use of the Hayward Rubber Company before the appointment of a receiver. The second count was for money had and received for the use of the plaintiff after his appointment as receiver. A stipulation between said parties is as follows:

"It is stipulated and agreed by and between the plaintiff and defendant in the above-entitled action that the balance due to the plaintiff from the defendant under the first count of the substituted complaint, exclusive of the disputed items of $21,808.40, claimed by the defendant for services as gen'l manager, and of $17,550, had and received by Hayward Rubber Co. in payment of preferred stock, is the sum of $10,494.96, with interest thereon from December 15, 1887, and that the balance due to the plaintiff from the defendant under the second count of the substituted complaint is the sum of $24,011.00, with interest from January 15, 1999."

The facts, which upon such trial were found to be true and
29 which are true, are as follows:

The Hayward Rubber Co. was a joint stock corporation for the manufacture of India-rubber shoes, duly incorporated in accordance with the statutes of Connecticut, and located at Colchester, in this

State. Its capital stock was $400,000. The par value of its shares was $25.00. Before 1879 it had been a very profitable company and had paid large dividends. Its last dividend was made in 1881. Thereafter its business deteriorated and became unprofitable. In January, 1883, some of the principal stockholders endeavored to find a skilled rubber manufacturer who would become interested in the company and would oversee or direct its management and would take the charge of selling its goods.

Negotiations were entered into with the defendant, Joseph Banigan, who was president and general agent of the Woonsocket Rubber Company and was a well-known and successful rubber manufacturer, which resulted in their agreeing to furnish him and his agreement on January 12, 1883, to purchase 4,000 shares of the capital stock of said company at $12.50 per share.

This agreement was carried out, and on January 30, 1883, Mr. Banigan was appointed general agent by the directors, who defined his duties, which were in general that he was to have full control of the manufacturing, subject to their approval. No salary was then or ever designated, nor was any vote passed on the subject.

Mr. Banigan still attended to his duties and business at Providence. He went to Colchester once in a week or fortnight, remaining there one, two, or three days, as the case might be. He entered actively upon the oversight of the business, laid out and arranged for new buildings, bought new machinery, ordered new lasts, tools, rolls, and cutting machinery, had automatic sprinklers put in the mill, all at an expense of some $120,000; inspected the new goods, secured the dismissal of old officers, appointed a new superintendent, caused a saving in the management of the business, and reduced the pay-roll, while not reducing the quality of manufactured goods, and carried on correspondence with the new superintendent and the treasurer. He also purchased the supplies, except for three months, when he was in Europe.

In April, 1883, the Woonsocket Rubber Company, 40 or 50 per cent. of the stock of which Mr. Banigan owned, became the selling agents of the Hayward Rubber Co., and so continued until April, 1886. At that time the various rubber manufacturing companies formed a corporation called the Rubber Boot and Shoe Selling Company, in which each company took stock, and which was to sell all the production of all the stockholders. The Hayward Rubber Company took about $24,000 of stock. The agency continued a year with disastrous results, particularly to the Hayward Rubber Company. The Woonsocket Rubber Co. then declining to be its selling agent, Mr. Banigan became such agent, and sold all the goods thereafter upon the same commission which had been paid to the Woonsocket Co. The amount of commissions was paid.

In March, 1885, a committee of the directors, of which committee Mr. Banigan was a member, sent a circular to the stockholders recommending an increase of the capital by the issue of preferred stock to the amount of $100,000, saying that it was desirable to have an unanimous vote in favor of the proposition, asking for proxies, and

inclosing the proposed resolutions, which were to be submitted to a stockholders' meeting to be held on March 25, 1885.

At said meeting the stock was increased $100,000 by the authorization of the issue of preferred stock entitled to cumulative
31 dividends of eight per cent. per annum, which should take precedence of all dividends on the common stock and any future additions thereto, and which preferred stock could be retired when the financial condition of the company would warrant, in such amounts and at such times as might be determined on by vote of the stockholders, at par and accrued dividends, and such retirement should be *pro rata*. The votes in regard to the issue of preferred stock were passed by an unanimous vote of the shares present or represented at said meeting at the time when said vote was taken, being 13,404 shares; the whole number of shares was 16,000. One stockholder of record holding stock hypothecated to it subsequently brought to the proper State court a petition for an injunction against the issue of said preferred stock, but discontinued or withdrew said petition. Each stockholder had the privilege of subscribing to said preferred stock in proportion to the number of shares of existing stock by him owned. If any stockholder neglected for a specified time to subscribe for his portion of preferred stock, the same could be disposed of by the treasurer for the use of the company at not less than par.

Mr. Banigan subscribed for 702 shares of the preferred stock, and on April 2, 1885, paid the company therefor $17,550, and received a certificate for said shares which contained in substance the provisions of said votes. Shares to the amount of $25,000 in all were subscribed for. The subscription agreement which Mr. Banigan and the other subscribers signed was as follows: "We, the undersigned, herewith subscribe for the number of shares of the preferred stock of the Hayward Rubber Company affixed opposite our names."

The defendant voted upon his stock at one or two annual
32 meetings thereafter. On June 26th, 1885, he wrote to Potter, Lovell & Co., note brokers, of Boston, enclosing a statement of the company's affairs, and saying that it had arranged to issue $100,000 preferred stock, but "Only one-quarter of it has yet been issued, which I have taken principally." No claim for the repayment of this $17,550 was made until 1888. No certificate of the increase of capital stock was filed in the office of the secretary of state, or of the town clerk of Colchester.

Mr. Banigan continued to be the general agent until the company went into the hands of a receiver, on August 9th, 1887.

No charge was made by him on the books of the company and no claim was made for salary until after the appointment of the receiver. At the annual meeting of the stockholders in January, 1884, he said to them that he was serving the company without compensation. At another subsequent meeting of the stockholders, when his management was criticised, he justified it and said that he was not receiving compensation for his services.

On May 26, 1887, he wrote to the treasurer criticising a neglect to receive the company's goods from the selling Co. and said, "I am

not under pay by the Hayward Rubber Co., and I should not be expected to look after such business, but if no one gives it any attention I feel it incumbent on myself to protect the company."

He testified upon cross-examination that he supposed his salary would be determined at the proper time, when the company was in funds; and, further, that he supposed when the company got in good condition he was to have a salary.

There was no understanding, express or implied, that he was to have no salary in consideration of the sale of 4,000 shares at $12.50 per share. Nobody testifies to that effect. He made a large investment in the stock, at a price supposed to be cheap, in the expectation that it would be a profitable one. The stockholders
33 wanted him to become pecuniarily interested in the company, and so be stimulated to render it valuable services and assistance. He thought that the company was not in a condition to pay large salaries, and was out of funds, and therefore took no money and made no charge. When it became prosperous he expected to have a large salary for the future, if he remained in the company, and that he would be paid something that was in the way towards compensation for the past.

He trusted that future success would enable him to be compensated. He thus truthfully said that he was serving without pay. He was not at that time receiving and it might be that he never would receive pay.

I find no agreement between the parties for service without compensation and no abandonment on the part of Banigan of a claim for some compensation for the current service, but the subject was one to be determined at a future time, when the company was pecuniarily able to determine it. He was serving upon a contract that he should have payment in the future, and his conduct and testimony show that the time and amount of payment were to be contingent upon the time when and the sum which the company should be able to pay. In now ascertaining the proper amount the contract is to control, and reference is to be had to the financial ability of the company, as well as to the amount of services, and what would have been the market value under other and different circumstances. The company is now insolvent and unable to pay its creditors in full.

Mr. Banigan actually served from January 13th, 1883, to August 9th, 1887, except an absence of about three months, and is entitled to compensation for the period of four years and four months at the rate of $2,500 per annum, being $10,833.33.

34 The claim for $17,550 rests upon a question of law. The contention of the defendant is that, inasmuch as the statutes of the State of Connecticut simply allow a joint stock company to increase its capital stock and the articles of association gave no authority to make preferred stock, it was beyond the power of the Hayward Rubber Company to create such a class of stock, and there was a total failure of consideration for the contract; that no estoppel can exist against the assertion of the invalidity of the

stock, and that the defendant is entitled to recover the amount paid by him from the corporation.

The text books announce the doctrine that in the absence of authority in the charter or statutes or articles of association to make a preferred or a special stock, and in the absence of unanimous consent on the part of the stockholders, preferred stock cannot be created. Mr. Beach, whose learning on the subject of corporations made any utterance of his on that subject valuable, said in his treatise on the joint-stock act of Connecticut (page 25): "It seems to be a valid objection to the issue *if* preferred shares; that it impairs the existing equality among the stockholders; but no good reason can be assigned why the articles of association may not lawfully provide for the issuing of such preferred shares, and probably the issue of such shares by the unanimous consent of all the stockholders of an existing company would be held valid." For the purposes of this case, I shall assume that the unanimous consent of all the stockholders not having been affirmatively expressed, the preferred stock was invalid. If so, the acquiescence of the stockholder cannot give it validity, and he is not estopped from asserting that it is invalid (Scoville *v.* Thayer, 105 U. S., 143). If a stockholder could be estopped, Banigan would necessarily be, because he was one of the promoters of the scheme, urged his co-stockholders to buy, voted upon it, and, for the purpose of favorably explaining the company's position to the firm which was to take and negotiate its paper, asserted that it could issue preferred stock, and had done so to the amount of $25,000.

Notwithstanding the Massachusetts authorities to the contrary (American Tube Works *v.* Boston Machine Co., 139 Mass., 5; Reed *v.* Boston Machine Co., 141 Mass., 454), I am not favorably impressed with the doctrine that, as against the assignee or receiver of an insolvent corporation, the owner of preferred stock who has voluntarily subscribed and paid for it for the purpose of promoting the scheme, and has received his certificate therefor, and the terms and conditions upon which the subscription was made have been fully complied with by the corporation, can recover the amount paid. In Winters *v.* Armstrong, 37 Fed. Rep., 508, Judge Jackson guards against such a broad principle, and it is not in accordance with the teaching of Scoville *v.* Thayer, *supra*.

If he can recover the amount from the insolvent estate in a case where there is no claim of an unfulfilled condition it is upon the theory of rescission of the contract, because the stockholders have received nothing of value. (American Tube Works *v.* Boston Machine Co. *supra;* Allen *v.* Herrick, 15 Grey, 274.) This rescission must be made within a reasonable time. In this case Mr. Banigan paid for his stock April 2nd, 1885, and was still a stockholder when the receiver was appointed, August 9th, 1887. I do not think that the preferred stockholder who voluntarily creates stock of this kind—for this Mr. Banigan virtually did—can hold it twenty-eight months in the hope of dividends, and then, upon finding the company insolvent, come in as a creditor and receive back his money.

Let judgment be entered for the plaintiff for the sum
36 admitted in the stipulation to be due upon the second count, with interest from January 15, 1888, to June 15th, 1889, the amount being $26,051.93. The amount admitted to be due on the first count is $10,494.96, and with interest from Dec. 15, 1887, to June 15, 1889, is $11,439.50. The amount due from the corporation to the defendant for his salary and a proper set-off against this last-named sum is $10,833.33, which, with interest from August 9th, 1887, to June 15, 1889, is $12,035.83. The excess, being $596.33, is a proper claim for a dividend against the insolvent estate.

Halsey and Briscoe, for the plaintiff; Doolittle and Bennett, for the defendant.

And on the 2d day of July, 1889, plaintiff's application to amend finding of facts and order thereon was filed in the words and figures following, viz:

37 Circuit Court of the United States, District of Connecticut.

CHARLES BARD, Receiver of The Hayward Rubber Company,
Plaintiff,
vs.
JOSEPH BANIGAN, Defendant.

To the Honorable Nathaniel Shipman, district judge:

The plaintiff in the above-entitled action respectfully prays your honor to amend the finding of facts filed in said cause in the following particulars, to wit:

1. By striking out the words in the 16th and 17th lines of the 4th page of said finding—

"These votes were passed by a two-thirds vote of the stockholders. One stockholder dissented."

And inserting in lieu thereof the following:

"These votes were passed by the unanimous vote of the stockholders present or represented by proxy, the same being more than two-thirds vote of the whole capital stock."

PLAINTIFF,
By HALSEY AND BRISCOE, *Att'ys.*

38 U. S. Circuit Court, District of Connecticut.

CHARLES BARD, Receiver, etc.,
vs.
JOSEPH BANIGAN.

On reading and filing the foregoing application it is ordered that a hearing be had on the same at the United States court-room, in Hartford, on the 9th day of July, 1889, at 10 o'clock in the forenoon, when and where the defendant may appear and show cause, if any there be, why the prayer of said application should not be granted, and that notice of such hearing be given to the defendant by deliv.

ering to him or his attorneys of record herein a true copy of said application and of this order at least five days before said day of hearing.

Hartford, July 2, 1889.

By the court:

Attest: E. E. MARVIN, *Clerk.*

We duly accept service of the foregoing.

DOOLITTLE AND BENNETT,
Att'ys for Def't.

And on the 11th day of July, 1889, finding of facts was amended by the court.

And on the 3rd day of August, 1889, defendant filed bill of exceptions in the words and figures following, viz:

39 United States Circuit Court, District of Connecticut.

CHARLES BARD, Receiver of The Hayward Rubber Company,
vs.
JOSEPH BANIGAN.

Be it remembered that on the trial of the above-entitled cause under stipulation to the court and upon the pleadings as on file, the court having filed with the clerk of this court its finding of facts and its conclusion of law thereon, the defendant, before judgment, files this his bill of exceptions thereto.

Upon the trial of this case the facts and evidence appearing therein were as stated in the finding and opinion of the court as on file, to which reference is had as part of this bill of exceptions.

Upon said trial the defendant claimed as follows:

1. That upon the facts as found and the evidence in the case and under the pleadings in the case the defendant is entitled to set off the amount of $17,550 paid by him upon his subscription to the preferred stock of the said Hayward Rubber Company, with lawful interest thereon against any such indebtedness as is found due from him to said corporation, and to recover any balance due to him after making such set-off, or to have such balance recognized and established as a lawful claim against such corporation and its assets in the hands of the receiver.

2. The defendant claimed that the said corporation had no power to create preferred stock, and that upon the facts as proved and found said acts of said corporation in attempting to create preferred stock were entirely void, and that the said Banigan had a valid and legal claim against the corporation for the amount by him
40 paid on said stock which could properly be set off, as hereinbefore set forth, and that the said Banigan was not chargeable with laches in not presenting his claim against said corporation for said preferred stock prior to the appointment of a receiver.

But the court overruled each and all of said claims of the defendant. Whereupon the defendant excepts thereto and to each and all

of the rulings and decisions upon matters of law in reference to said claims contained in said finding and judgment of the court, and prays that these exceptions may be made part of the record in said cause.

The foregoing bill of exceptions is allowed, and the presiding judge did, in pursuance of the defendant's request and of the statute in such case provided, allow, sign, and seal this bill of exceptions containing the several matters aforesaid at and during the term of the court at which the trial was had and judgment rendered, to wit, at the April term of said court, 1889.

N. SHIPMAN, [L. S]
District Judge.

And on the 8th day of August, 1889, judgment for the plaintiff was entered in the words and figures following, viz:

41 Whereupon it is considered by the court that the sum of $12,035.83, found to be due from said The Hayward Rubber Company to said Banigan, be applied as a set-off against said sum of $11,439.50, and the excess thereof, to wit, $596.33, is a proper claim against said The Hayward Rubber Company for a dividend from its estate.

It is further considered that the said plaintiff recover of the said defendant the sum of $26,051.98, with interest thereon from the 15th day of June, 1889, together with the costs of this suit, taxed and allowed at the sum of $102.51, and that execution issue for the same accordingly.

I, Edwin E. Marvin, clerk of the circuit court of the United States within and for the district of Connecticut, do certify that the foregoing is a true copy of the record and proceedings in this court in the cause of Charles Bard, receiver of the Hayward Rubber Company *vs.* Joseph Banigan.

In testimony whereof I have set hereto my hand and the seal of said court, at Hartford, in said district, this first day of October, A. D. 1889.

[Seal of Circuit Court, Connecticut.]

Attest: E. E. MARVIN, *Clerk.*

Endorsed on cover: Connecticut C. C. U. S. No. 1354. Joseph Banigan, plaintiff in error, *vs.* Charles Bard, receiver of the Hayward Rubber Company. Filed October 14, 1889.

JAN 7 1890

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 1354.

JOSEPH BANIGAN, *Plaintiff in Error*,

vs.

CHARLES BARD, *Receiver of the Hayward Rubber Company.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF PLAINTIFF IN ERROR.

TILTON E. DOOLITTLE,
of Counsel.

Hoggson & Robinson, Law Printers, New Haven.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 1354

JOSEPH BANIGAN, *Plaintiff in Error,*

vs.

CHARLES BARD, *Receiver of the Hayward Rubber Company.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This suit was brought to the Superior Court of the State of Connecticut in and for New London County, by Charles Bard, the Receiver of the Hayward Rubber Company, a Connecticut corporation, against Joseph Banigan, a citizen of Rhode Island, claiming fifty thousand dollars

damages, and came by removal to the Circuit Court of the United States for the District of Connecticut.

In the Circuit Court, the said Bard, Receiver, substituted a complaint for the one originally filed, setting out in one count a claim against the said Banigan for money had and received, before the appointment of the Receiver, to and for the use of the said Hayward Rubber Company; and in a second count a claim for money had and received by the said Banigan, to and for the use of said Receiver after his appointment, and filed a Bill of Particulars.

Record, pp. 8 and 9.

The allegations of the substituted complaint were denied and certain claims of the said defendant against the said Hayward Rubber Co. and the said Bard, Receiver, for services and for money had and received, were pleaded as a set-off and a Bill of Particulars filed.

Record, pp. 10–13.

An answer was filed by the said Receiver denying the allegations contained in said set-off.

Record, p. 13.

The cause was by stipulation tried to the Court.

Upon the trial of the case the parties came to an agreement in regard to all the items in dispute save two, and entered into a stipulation that the balance due the said

Bard, Receiver, under the second count of the substituted complaint, was $24,011.00; and that the balance due him under the first count of said substituted complaint was $10,494.96, exclusive of said two items still in dispute.

One of the said items remaining in dispute was a claim of the said Banigan for $21,808.40 for services rendered the Hayward Rubber Company as its general manager. The question involved was altogether one of fact, and the Circuit Court decided it in favor of the plaintiff in error, finding there was due him for such services the sum of $10,833.33 and that said amount with interest was a proper set-off against the said balance agreed upon in said stipulation as due under the first count of said substituted complaint.

The remaining item in dispute was a claim of the said Joseph Banigan for $17,550 with interest, for money received from him by The Hayward Rubber Company in payment of his subscription for certain so-called preferred stock of said Company. The Circuit Court decided upon this claim adversely to the plaintiff, and it is its rulings in this regard which are sought to be reviewed.

The Hayward Rubber Company was a joint stock corporation, organized under and by virtue of the general act of the State of Connecticut in regard to joint stock corporations. The capital stock was $400,000 divided into 16,000 shares of the par value of $25.00 each.

The Court finds that before 1879 it had been a very

profitable company and had paid large dividends, but that after 1881 its business deteriorated and became unprofitable. In January, 1883, some of its principal stockholders endeavored to find a skilled rubber manufacturer who would become interested in the company and would oversee or direct its management.

Record, p. 15.

Negotiations were entered into with the plaintiff in error, who was president and general agent of the Woonsocket Rubber Company and was a well known and successful rubber manufacturer, which resulted in his becoming interested in the company as stockholder. He was afterwards elected a director and appointed general agent of the corporation, and conducted its business with great fidelity, skill and judgment, as appears in the finding of the Court.

Record p. 15.

In March, 1885, the Haywood Rubber Company was again in difficulties, through the failure of a certain other corporation, the Rubber Boot and Shoe Selling Company, to perform the purpose for which it was organized, and it was proposed to increase its capital by the issue of a stock called preferred stock.

A circular to the stockholders was sent out recomending an increase of the capital by the issue of preferred

stock to the amount of $100,000. saying that it was desirable to have an unanimous vote in favor of the proposition, asking for proxies and inclosing the proposed resolutions which were to be submitted to a stockholders meeting to be held on March 25th, 1885.

At the meeting of the stockholders it was voted to increase the capital $100,000. by the authorization of the issue of a preferred stock entitled to cumulative dividends of eight per cent. per annum, which should take precedence of all dividends on the common stock and any future additions thereto, and which preferred stock could be retired when the financial condition of the company would warrant, in such amounts and at such times as might be determined on by vote of the stockholders, at par and accrued dividends, and such retirement should be *pro rata*.

The votes in regard to the issue of the preferred stock were passed by an unanimous vote of the shares present or represented at the meeting, there being 13,404 shares present out of 16,000, the whole number. The whole number of shares was not present or represented.

It was not proved that the remaining stockholders in any way assented to said issue of said preferred shares, or in any way authorized the same.

It was shown that one stockholder dissented and emphasized his dissent by bringing to a proper Court a petition for an injunction against the issue of said preferred stock.

Mr. Banigan subscribed for 702 shares of the preferred stock, and on April 2nd, 1885, paid the company therefor $17,550, and received a certificate for said shares which contained the provisions of said votes. Shares to the amount of $25,000 in all were subscribed for.

The subscription agreement which was signed by the plaintiff in error and the other subscribers was in the following words:

"We, the undersigned, herewith subscribe for the number of shares of the preferred stock of the Hayward Rubber Company affixed opposite our names."

No certificate of the increase of the capital of the Hayward Rubber Company was filed in the office of the Secretary of State or of the Town Clerk of Colchester, the town in which said corporation was located.

It is found by the Court that Mr. Banigan voted upon his stock at one or two annual meetings after it was issued to him. It is also found that in June, 1885, he wrote to certain note brokers of Boston enclosing a statement of the company's affairs and saying that it had arranged to issue $100,000 preferred stock, but that only a quarter of it had been issued which he had taken principally. It is not found that any person was in any way influenced or prejudiced by that remark. It is not found that in any other way or upon any other occasion the action of the company in regard to the issue of said stock was either by annual report to the Secretary of State, or Town Clerk, or in any other manner made public.

Nor is it found that any of said preferred stock has been sold or transferred by any of the subscribers thereto.

ASSIGNMENT OF ERROR.

1st. That the Circuit Court erred in ruling that upon the facts as found and the evidence in the case and under the pleadings the plaintiff in error had not a valid and legal claim against said The Hayward Rubber Company for said amount of $17,550.00 paid by him upon his subscription to the said preferred stock, with lawful interest thereon, which he was entitled to set-off against the indebtedness found due from him to said corporation, and after making such set-off any balance thereof due him to have established as a lawful claim against the assets of said corporation in the hands of the receiver.

2nd. That the Circuit Court erred in ruling that if the plaintiff in error had a valid and legal claim against said corporation for said sum of $17,500 as aforesaid that he has been guilty of such *laches* in presenting and enforcing such claim as to debar him from remedy in this suit.

POINTS.

FIRST.

The Hayward Rubber Company had no power to issue preferred stock, and its action in attempting to issue said stock was illegal and of no effect.

1st. The act under which the corporation, The Hayward Rubber Company, was organized, is found in chapter CXX, p. 422, of the General Statutes of Connecticut, §§ 1,944 to 1,968, inclusive.

Section 1,944 provides that "Any three persons who shall associate by written articles which shall express their agreement to constitute a corporation, the name by which it shall be known, the purpose for which it is constituted, the town in this State in which it is to be located, the amount of its capital stock, and the number of shares each person is to take, which shares shall be of the par value of one hundred dollars, fifty dollars, or twenty-five dollars, as may be prescribed in the said articles, under any name commencing with "The" and ending with "Company" or "Corporation," which name is not then in use by any existing corporation in this State, for the purpose of carrying on any lawful business in this State, and out of this State, whatever lawful business may be incidental to the business within it, such business not to be trust, insurance, buying and selling real estate, banking or trading in bonds, notes, or other evidences of indebtedness, or trafficking in letters patent or patent rights, shall, when so associated, and when a certificate shall have been filed with the Secretary of the State as hereinafter provided, become and remain a joint stock corporation under this chapter."

Section 1,945 and 1,946 provide for an organization of the corporation, and an election of directors and adoption of by-laws by a meeting of the subscribers to the stock.

Section 1,947 is as follows:

"No association of persons, under this chapter, hereafter organized, shall commence business until all its capital stock shall be subscribed for by *bona fide* subscribers, and at least twenty per cent. thereof paid for in cash, nor until the requirements of the succeeding section shall have been complied with; and in case any portion of the balance of said stock shall be paid for in property, real or personal, such property shall be estimated for such purpose at the actual value thereof."

Section 1948 directs that "the directors shall cause the articles of association to be published at full length in a newspaper published in the county where the corporation is located; and a majority of the directors shall make, sign and swear to a certificate setting forth a true copy of the articles of association, which certificate shall state that such publication has been made and also the name of the newspaper containing such publication, with the date thereof, and shall also state the names and residences of the subscribers thereto, the amount of the stock taken by each, the amount actually paid for in cash, and the amount paid for in property, specifying the same and giving the actual value thereof, and in case any portion of said property consists of letters patent or rights under the same, the number and date of the patents and the nature of the invention shall be given; which certificate shall be deposited in the office of the Secretary of State, who shall cause the same to be recorded, and a duplicate thereof shall be recorded in the Town Clerk's office of the town where said corporation is located. No such certificate shall be received or recorded by the Secretary of State or

by any town clerk, which shall fail to state that twenty per cent. or more, as the case may be, of the stock has been paid for in cash as required by this chapter."

Section 1954 provides that "every such corporation may increase or reduce its capital and the number and par value of the shares therein, at any meeting of the stockholders specially warned for that purpose, by a vote of stockholders, holding at least two-thirds of the whole stock: and certificates of the increase or reduction of said capital or the number or value of said shares shall be made, filed and recorded as provided in this chapter for original stock."

Section 1955 is a provision that in case the capital stock of such corporation shall be increased as provided in the preceding section, at least twenty per cent. of the amount added shall be paid to the corporation, either in cash or in property estimated at its actual value, or in actual surplus earnings of the corporation, and that the certificate of the increase shall state the amount so paid and the manner of payment and shall not be received or recorded unless it contains such statements.

The above provisions contain all the power which The Hayward Rubber Company had to issue stock.

There is no question as to the rule to be applied in the construction of this act, it having been recently settled in this Court.

In the case of

The Oregon Railway Co. *vs.* Oregonian Railway Co., 130 U. S. 1.

one of the two questions before the Court was, as stated in the opinion, whether the Oregon Railway and Navigation Company, the defendant in the action, organized under the laws of the State of Oregon, had the legal capacity and lawful power to make a lease with the Oregonian Railway Company of the latter's railroad.

The Oregon Railway Company was organized under a general act of the State of Oregon, which act is set out in the report of the case begining on page 9.

If a comparison be made between this Oregon Corporation act and the joint stock law of the State of Connecticut they will be found in all important respects alike. The rules adopted in ascertaing the powers of the Oregon Corporation apply when a like inquiry is made as to the power of The Joint Stock company of Connecticut.

The Court states, (p. 21), the general rule appliable to the construction of charters of corporations created by special act.

"Outside of the powers conferred and the privileges granted to these organizations by the statutes under which they exist, they are in all the States of the Union, which, like Oregon, have the common law as the foundation of their jurisprudence, governed by that common law, and it is the established doctrine of this Court, and, with some exceptions, of the States in which the common law prevails, as well as of Great Britain, from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the Legislature which granted that charter."

That such is the established doctrine in Connecticut is shown by many decisions of its highest Court.

New London *vs.* Brainard, 22 Conn., 555.
New York Firemen Ins. Co. *vs.* Ely, 5 Conn., 568.
Occum Co. *vs.* Sprague Mfg. Co., 34 Conn., 541.
Hope Mutual Life Ins. Co., *vs.* Weed, 28 Conn., 63.
Catlin *vs.* Eagle Bank, 6 Conn., 240.
Berlin *vs.* School Society, 9 Conn., 180.
Mechanics, &c., Savings Bank *vs.* The Meriden Agency Co., 24 Conn., 164.

Considering further the question, the Court say, (Oregon Ry. *vs.* Oregonian Ry. Co., p. 23), "we are here met with an embarrassment coming out of the circumstance that neither the plaintiff nor the defendant in the present case professes to exercise its powers under any special charter conferred on it by the Legislature of Oregon. That State, in accordance with the principle laid down in its constitution, to which we have already referred, passed general laws for the formation of private corporations."

And (on pages 26–27) "It is to be remembered that when a statute making a grant of property, or of powers, or of franchises, to a private individual, or a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public. As was said in the case of *Charles River Bridge* vs. *Warren Bridge*, 11 Pet., 420, "in this Court the principle is recog-

nized that in grants by the public nothing passes by implication." See also *Dubuque & Pacific Railroad Co.* vs. *Litchfield*, 23 How. 66; *Turnpike Co.* vs. *Illinois*, 96 *U. S.*, 63.

Therefore if the articles of association of these two corporations, instead of being the mere adoption by the corporations themselves of the declaration of their own purposes and powers had been an act of the Legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a Court called upon to determine the powers granted by these articles of association construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation.

We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte*; their formation and execution—what shall be put into them as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good.

These articles, when signed by the corporation, acknowledged before any justice of the peace or notary public, and filed in the office of the Secretary of State and the clerk of the proper county, become complete and operative. They are, so far as framed in accordance with law, a substitute for legislation, put in the place of the will of the people of the State, formerly expressed by acts of the legislature. Neither the officer who takes such acknowledgment nor those who file the articles have any power

of criticism or rejection. The duty of the first is to certify to the fact, and of the second to simply mark them filed as public documents in their respective offices.

These articles which necessarily assume by the sole action of the corporation's enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction."

Oregon Railway Co. *vs.* Oregonian Railway Co., 130 U. S., 26, 27.

Assuming the rule as to the construction of the general corporation act, and the articles of association of the Hayward Rubber Co. filed under it to be settled in the above decision, we claim that neither by an express grant or by necessary implication had the Hayward Rubber Company at the time of its organization, or afterwards, power to issue preferred stock.

There is certainly no express power given. The power to issue stock can refer only to such stock as is ordinarily and usually issued. The statute directs that the articles of association shall state "the amount of its capital stock, and the number of shares each person is to take, which shares shall each be of the par value of one hundred dollars, fifty dollars, or twenty-five dollars, as may be presented in said articles." That there is but one class of stock here contemplated, and this the ordinary or common

stock, with shares equal in value and in right, would seem too clear for argument.

So in

Kent *vs.* Quicksilver Mining Co., 78 N. Y. p., 179.

where a by-law was made which declared the whole value of the property, the whole amount of its capital stock, and divided it into shares equal in amounts, and directed certificates of stock to be issued therefor, the Court held "It is not to be said that this by-law authorized anything but shares equal in value and in right; or that the taker of one did not own as large an interest in the corporation, its capital affairs, and profits to come, as any other holders of a share."

This would be the construction of the words of the act if found in an ordinary contract between individuals and without the rigid rule applicable to grants by the State to corporations.

So it has always been held where the question arose between the corporation and a minority of its stockholders as to the rights of the corporation to create preferences, that in the ordinary contract of membership entered into by a stockholder in a corporation having no express power to create preferences there is an implied condition that the stockholders are entitled to rank equally without preferance or priority.

Hutton *vs.* Scarborough Cliff Hotel Co., 2 Dr. & Sm., 514, 521.

And see cases cited on bottom of this page and top of next.

But if the contract entered into by the member in taking shares, and the corporation, must be construed to exclude any classification or preference among the stockholders, how much more must the articles of association and the general act, the grant of the State to the corporation, as between the public and the corporation, be thus construed.

The act includes (Section 1954,) a power to increase the capital, but there is in that section nothing expressly authorizing the creation of a different stock from that originally created. This section provides in detail what may be done to vary the capital and the shares. The words are "every such corporation may increase or reduce its capital and the number and par value of the shares therein," etc.

No one will claim that under this provision the two-thirds majority of the stock could create a preferred stock contrary to the will of the minority. Yet if the corporation under the words of the act took from the State the power to create such stock, by what right could the minority object. They would have entered into membership in a corporation having power by a vote of two-thirds of the whole stock to create that preference and therefore subject to that right.

Hutton *vs.* Scarborough Cliff Hotel Co.,
2 Dr. & Sm., 514.

In re Bangor, &c., Slate, &c., Co., L. R. 20, Eq., 59.

Moss *vs.* Syers, 32 L. J., Ch. 711.

Harrison *vs.* Mexican Ry. Co., L. R. 19, Eq., 358

Melhado *vs.* Hamilton, 28 L. T. N. S., 578.

A corporation has no power to increase its capital stock without express authority from the legislature, and if power be given to increase its capital by the issue of common stock there is an implied prohibition against the issue of any other kind.

Railway Co. *vs.* Allerton, 18 Wall., 235.

Sutherland *vs.* Olcutt, 95 N. Y., 93.

Scovill, *vs.* Thayer, 105 U. S., 143.

New York, &c., R. R. *vs.* Schuyler, 34 N. Y., 30.

Salem Mill Dam Co. *vs.* Ropes, 6 Pick., 23.

Knowlton *vs.* Congress, &c., Spring Co., 14 Blatch., 364.

Smith *vs.* Goldsworthy, 4, Q. B., 430.

Re Financial Corporation Holmes' Case, L. R., 2 Ch., 714.

Droitwich Salt Co. *vs.* Curzon., L. R., 3 Exch., 42.

2nd. The act of the corporation in attempting to issue preferred stock affected the interests of the public as well as the interests of the dissenting stockholders, and could not be justified even by unanimous consent.

This Court in the case of The Oregon Ry. Co. *vs.* The Oregonian Ry. Co. already referred to (pp. 20-21) in considering the reason for the passage of such general corporation acts as the present found it in the evils resulting from the hasty manner in which special charters were granted by the legislatures, sometimes with exclusive privileges, often without due consideration and under improper motives, and in the desire of the public to fix some uniform rule by which the rights and powers of private corporations or those for pecuniary profit should come into existence.

The act is the expression of an intention that all such corporations shall be alike and shall vary only so far as the purposes for which they exist differ, and the capital invested differs in amount. And this intention being manifiested it is not perhaps necessary to seek for a reason or to ask why the public desire it to be so. It is sufficient that the intention is apparent in the act, to absolutely prohibit as a public wrong any deviations from the law. But a reason is not far to seek and is found in the greater certainty and ease with which such corporations may be regulated, and the law in regard to them established if all conform to one standard. And with respect to the creation of classes of shares by annexing

privileges to one class which another may not have, a particular reason exists for the prohibition, in the protection of such of the public as may desire to purchase shares. The statute provides for public notice of the capital, the number of shares, and of the general condition of the affairs of such corporations, (Gen. Stat. of Conn., § 1,956), by annual reports filed in public offices, as well as by the certificates of organization, but for no notice of preferences among the shares, and it is easily perceived that the public in trafficking in the common stock of such companies, without notice of a different and privileged class of shares, might through fraud or mistake suffer much harm.

If this claim is well taken it must follow that the stockholders could not either by agreement in the articles of association or by unaminous consent in increasing the stock, validate the act.

It is certain that by inserting in the articles of association a declaration of their intent to issue preferred stock, they could not get the power to issue such stock if either expressly or by implication the law forbade it. The articles of association do indeed stand in the place of a charter but anything in the articles not warranted by the law is void.

Oregon Ry. Co. *vs.* Oregonian Ry. Co.,
130 U. S., 25.

And no assent by the stockholders, even if the assent be unanimous, can make valid any such assumption of power.

Thomas *vs.* R. R. Co., 101 U. S., 71.

In the case of Kent *vs.* Quicksilver Mining Co., 78 N. Y., 159, it was held that the act of the corporation in issuing preferred stock was beyond its power; but that this act, *ultra vires* though it was, did not affect the public right, but the interest of the stockholders alone, and therefore could be by them validated, and that under the facts of the case the stockholders were estopped from denying the validity of the stock.

But that case is distinguished from the present in this; that the Quicksilver Mining Co. was created by a special act and not organized under a general law. There was not therefore in that case as in this an intention manifested that the corporation should be one of many alike, conforming in every way to a particular standard, and it did not therefore in its creation of the preferred stock violate the intention of the law as respects the public. And in considering that case it is important to notice that under its special charter the corporation had power when it first organized to divide the interest in its capital stock into shares arranged in classes and the Court so holds. It did not do this but issued its stock in shares equal in amount and privilege. While therefore it could not thereafter, against the will of any of its stockholders, create prefer-

ences it might well do so with their consent, and they might ratify such action if originally done without their consent.

In the case of Ashbury vs. Watson, 30 Ch. Div., 376, a corporation was organized under a law permitting the arrangement of the shares in classes with preferences and the memorandum of association stated that a portion of the shares were to have certain preferences. The statute provided expressly that, which is as we contend necessarily implied in the Connecticut Act, to wit, that save in certain particulars set out in the statutes no alterations should be made by any company in the conditions contained in its memorandum of association. The corporation altered the priorities of payments as between the preference and ordinary stockholders. It was held that this action was not valid, and in the opinion of all the judges it would be invalid even if every shareholder were shown to have assented. The action of the company had been acquiesced in for ten years.

3d. If, however, we are wrong in the position that the issuing of the preferred stock affects the public interest, it must be conceeded that it affects injuriously the interests of the stockholders.

The rights of the stockholders to dividends and to the property as established in the contract of membership are fundamental in their character, and are not to be altered except by consent of all.

Kent *vs.* Quicksilver Mining Co., 78 N. Y., and cases quoted on pages 16 and 17 of the brief.

And see Ashbury *vs.* Watson, 28 Ch. Div., 5.

In such case the act would be no less *ultra vires* and of no effect until ratified. It then, upon ratification, takes its validity not from any power in the corporation but from a power in the stockholders to form a new agreement with each other.

Until the consent of all the stockholders is obtained the stock issued could have no validity, and as in this case that consent was never obtained, and as now the corporation having gone into insolvency, it can never be obtained, the stock must remain invalid.

It is evident that Mr. Banigan, in common with many of the other stockholders, believed that valid stock could be issued with the unanimous consent of all. For this reason, the call for the meeting of the stockholders asked for a unanimous vote.

It is evident also that although the stock was not all represented at the meeting it was hoped that all would eventually consent, and in this is found the explanation of the subsequent action.

The dissent of one stockholder and the bringing of suit for an injunction to prevent the issue of the stock evidences dissent, and there is nothing in the case to warrant

the conclusion that the consent of all was ever obtained. And it is clear that the dissenting stockholders never ratified the act and that they are not estopped from contesting its validity. The neglect of the company to file the certificate of increase of capital, directed by the statute, is evidence of the abandonment of the scheme.

In Kent *vs.* Quicksilver Mining Co., there were circumstances showing great laches on the part of the minority. They had allowed the preferred shares to be sold in the stock markets for years and they were in the hands of innocent purchasers. Here there are no such circumstances to estop the minority from denying that they have consented to the issuing of the stock. It is not shown that any of it has been transferred or sold. The transaction never was made public.

Ratification demands proof of notice to every stockholder and an intention to adopt the act of the corporation.

This is not shown here.

In *Ashbury* vs. *Watson*, 28 Ch. Div., 5 Affirmed., 30 Ch. Div., 376, before cited, it was urged that the acquiescence of the stockholders for ten years in certain acts of the corporation in regard to the preferred stock, assuming that the acts could be made valid by ratification, was sufficient proof of ratification. Says Baggallay, L. J.: "As to the second point, I do not think that these resolutions of the company which were *ultra vires* could have been afterwards ratified by subsequent acquiesence, but

assuming they could, there was no evidence that I can see of acquiescence with knowledge that the persons were acquiescing in *ultra vires* resolutions."

Ashbury *vs.* Watson, 30 Ch. Div., 384.

4th. It has sometime been claimed that the power to issue preferred stock is included within the necessarily implied power to borrow money.

But that the transaction was not that of debtor and creditor has been too often decided to require argument. It was that which it purported to be, an attempt to create a new stock.

Warren *vs.* King, 108 U. S., 389.
St. John *vs.* Erie Ry. Co., 22 Wall., 136.
Kent *vs.* Quicksilver Mining Co., 78 N. Y., 159.
Williston *vs.* Mich. So. and Ind. R. R., 13 Allen, 400.
Taft *vs.* Hartford, Prov. Fishkill R. R. Co., 8 R. I., 310.

To resume, it is claimed under this point that the preferred stock was void,

1st. Because The Hayward Rubber Co. had no power expressly given it to create preferred stock, and such action was by implication prohibited;

2nd. Because the exercise of such power was as well an injury to the public as to the minority of the stockholders;

3d. Because at all events it affected the fundamental agreement between the stockholders and the unanimous consent was not obtained;

4th. Because the act is not within any of the necssarily implied powers of the corporation.

SECOND.

The plaintiff in error is not, under the facts found, estopped from denying the validity of the stock.

The issuing of the preferred stock by the company being *ultra vires* and the stock itself void no acts of the plaintiff in error can be held to show a ratification or to estop him from asserting the invalidity. There is nothing to ratify, and the validity of the stock is not within his control. This point has been already decided in this Court.

Scovill *vs.* Thayer, 105 U. S., 143.

In that case certificates of stock were issued in excess of the limit imposed by the charter and were held to be void. It was shown that a stockholder attended the meeting at which it was voted to issue said illegal stock, that he subscribed for and received certificates thereof

and made payments thereon. It was claimed that by these facts he was estopped from denying the validity of the stock in an action against him for unpaid subscriptions. But the Court held that he was not estopped.

In State *vs.* Worth's Case L. R., 4 Ch. Ap., p. 682, quoted in the opinion in *Scovill* vs. *Thayer*, the same doctrine is laid down. It is said by Vice-Chancellor James: "This was a void agreement, with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentleman on the list of stockholders."

The doctrine of this Court, established in the case of Chubb *vs.* Upton, is not in conflict with the above claim. That case establishes the proposition that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create.

In Chubb *vs.* Upton the case finds that in 1870, acting under general laws of the State authorizing insurance companies to increase their capital stock, the directors and stockholders of the company took measures to increase its capital stock, and filed their papers for that purpose with the Secretary of the State. Upon the trial of the case Chubb objected to evidence of the proceedings by which the company increased its stock, upon the ground of their alleged *irregularity* and of *informality* in the papers filed in the public offices. It was not claimed

that the corporation had not power to increase its stock, or that the increase had not been properly authorized by a sufficient number of its stockholders.

Veeder vs. *Mudgett*, 95 N. Y., 295, is another case of the same description. The power to issue the stock existed, and the corporation, by the requisite two-thirds of its stockholders exercised that power failing only in the filing of a regular certificate. There was a way in which the increase of stock could be made lawful by the action of the corporation, for having obtained the required vote of its stockholders, the filing of a proper certificate was wholly within its power.

But in neither of these cases was the question presented whether an increase of stock issued by the corporation without requisite authorization by stockholders, would be so within the power of the corporation, as to enable it to make a valid contract with a subscriber to such new stock, and estop him from contesting its validity if he received a certificate and paid for it. Such an increase must be held not to be within the power of the corporation, and we find it so decided in

American Tube Works *vs.* Boston Machine Co., 139 Mass., 5.

Reed *vs.* Boston Machine Co., 141 Mass., 454.

In these cases the Boston Machine Co. had power, under the General Law of Massachusetts, to issue a certain

kind of stock known as "special stock" by a vote of three-fourths of its general stock. Special stock was issued, certain shares of which the plaintiff received and paid for and afterward received dividends upon. It was shown that the requisite vote of three-fourths of the general stock had not been obtained. Claims were made by the subscribers for the amounts paid on the special stock. The Court held the issue of the special stock to be *ultra vires* and the stock itself to be invalid and that the subscribers were not estopped and established the amounts paid as valid and legal claims. In *American Tube Works* vs. *Boston Machine Co.*, p. 11, the Court say "The issue of the special stock being invalid, and being open to repudiation by the corporation itself, or by dissenting stockholders, the plaintiff had an election to rescind the contract under which the special stock was taken and to be restored to its original position. *Allen* vs. *Herrick*, 15 Gray, 274, 284. It was not bound by estoppel. In all the cases which have come under our observation, where one has been held to be deemed a stockholder by estoppel, there has been a legal creation of the capital stock. Such was the case of *Turnbull* vs. *Payson*, 95 U. S., 418. But where the issue of the shares is illegal, where no sufficient steps have been taken to authorize the creation of the capital stock, where a person has acted and been treated as a stockholder in respect of shares which the company had no power to issue and where the shares cannot legally exist the person

taking them cannot, by estoppel or otherwise, become a member in respect to them. Lindley on Part., 137."

And see

Bank of Hindustan *vs.* Allison, L. R., 6 C. P., 222.

In the present case the preferred stock, even if it should be found that its issue affects no public right, yet can have no validity without the unanimous consent of the stockholders. This unanimous consent was no more within the control of the corporation than was the vote of three-fourths of the stock in the case last cited, and has never been obtained. The cases cited are directly in point upon the claim here made that the act of issuing preferred stock without the unanimous consent of the stockholders was not an irregularity within the meaning of Chubb *vs.* Upton, but was, within the meaning of *Scovill* vs. *Thayer*, *ultra vires*, and that the plaintiff in error is estopped from denying the validity of the stock so issued.

So, too, the following cases arising upon subscription to increase of stock in National Banks are in point.

Winters *vs.* Armstrong, 37 Fed. R., 508.
Schieronburg *vs.* Stephens, 32 Mo. Ap. 314.
Eaton *vs.* Bank, 144 Mass., 260.

In these cases, as in the present case, the power to make the increase valid was not in the corporation, but outside of it; here the unanimous consent of the stockholders was wanting, there the consent of the comptroller.

THIRD.

The preferred stock being invalid, the consideration of the contract failed, and the plaintiff in error can recover the amount paid.

In the case of Scovill *vs.* Thayer, before cited, the Court, having decided that the stock in question was void, considering the question of the liability of a subscriber to such illegal stock, say: "To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holders of such spurious stock has none of the rights, he can be subjected to none of the liabilities of a holder of genuine stock. *His contract to pay for spurious shares is without consideration and cannot be enforced.*"

It must also follow that the plaintiff in error, who, in good faith, subscribed and paid for shares which he believed to be genuine, entitling him to the rights not only of a holder of common stock but to certain valuable preferances, had, on the failure of the company to properly and lawfuly issue to him such valid stock, an action for the return of his money.

Judge Shipman, in his opinion in the present case, (Record, p. 18), says: "Notwithstanding the Massachusetts authorities to the contrary, (American Tube Works

vs. Boston Machine Co., 139 Mass., 5; Reed *vs.* Boston Machine Co., 141 Mass., 454), I am not favorably impressed with the doctrine that as against the assignee or receiver of an insolvent corporation, the owner of preferred stock who has voluntarily subscribed and paid for it for the purpose of promoting the scheme, and has received his certificate therefor, *and the terms and conditions upon which the subscription was made have been fully complied with by the corporation*, can recover the amount paid."

We respectfully submit that the learned judge here has erred in assuming that the terms and conditions upon which the subscription was made have been complied with. For it was certainly a condition that the corporation should furnish *valid* stock and this condition was not complied with. This is well stated by Judge Jackson in

Winters *vs.* Armstrong, 37 Fed. R., p. 512.

"The general principle is well settled that subscriptions to the capital stock of corporations are made upon the implied condition that valid stock, such as will confer upon the subscriber all the rights and privileges of a stockholder, is to be issued. The subscription promise rests upon this condition and understanding on the part of the corporation, and until the corporation is in a position to comply with this condition there is no enforcable liability against the subscribers to its stock."

Nor did the corporation comply with the provision of law, requiring the filing of a certificate with the Secretary of State, which is also a condition precedent.

How then can it be said that the corporation has complied with all the conditions of the contract with the plaintiff in error? The conditions, of all, the most important, remain uncomplied with. The plaintiff in error, then, should have the usual remedy always awarded to one who has paid money to another upon a contract which that other has failed to perform.

One of the cases decided in the English courts arising out of subscriptions to an increase of stock issued by a bank known as the Bank of Hindustan is very much in point. The facts were as follows:

Two incorporated banking companies, the Bank of Hindustan and the Imperial Bank of China, agreed to amalgamate, the substance and effect of the agreement being that the Imperial Bank transferred its business to the other in consideration of 20,000 shares in the Bank of Hindustan of £100 each, to be issued by that bank, at £6 premium, the stockholders of the Imperial Bank having the option to take this new stock in the Bank of Hindustan in exchange for Imperial Bank shares, they to make certain payments in addition as premium. The resolutions to accomplish this did not obtain the consent of all the stockholders of the Imperial Bank.

One Alison, being a stockholder of the Imperial Bank, having agreed to make the exchange and pay the premium, had twenty-five shares of the new stock allotted to him, and in 1865 paid in £150. Subsequent calls he

neglected to pay, but never repudiated his liability until in 1867, an action was commenced against him to collect the balance due on his said subscription. Subsequently, the dissenting stockholders in the Imperial Bank brought a bill to set aside the amalgamation as *ultra vires*, and upon trial of the case in 1868, the Court declared the agreement to be *ultra vires* and inoperative. The case is reported in Imperial Bank of China *vs.* Bank of Hindustan, L. R., 6 Eq., 91. Afterwards the case brought against Alison by the Bank of Hindustan was tried.

The Bank of Hindustan *vs.* Alison, L. R., 6 C. P., 54.

It was held that inasmuch as it had been decided that the amalgamation agreement was void, it was beyond the power of the Bank of Hindustan to carry out its agreement, and therefore Alison was not liable; and, further, that the Bank of Hindustan had no power under the proceedings to issue new stock, and for this reason the defendant was not a stockholder; and that he was not estopped. Afterwards upon proceedings in error, this decision was affirmed in the Exchequer Chamber.

Bank of Hindustan *vs.* Alison, L. R., 6 C. P., 222.

Proceedings were then had to wind up the Bank of Hindustan, and Alison made a claim for the return to him

of the £150 paid on the issue of new shares of the Bank of Hindustan.

In re Bank of Hindustan, *ex parte* Alison, L. R., 15 Eq. Cas., 394.

In deciding the case Sir W. M. James, L. J., says:

"This is a very simple case, and but for the elaborate argument at the bar would have been a very short one. The applicant seeks the return of money which he has paid as the price of certain shares which he did not get. There has been on both sides a common mistake of fact as well as of law, but without any fraudulent intention on the part of any one concerned. As it has turned out, there never were in existence any shares such as the company purported to allot to him. That being so it seems a mere matter of course for him to say 'give me back my money; I have received no shares.' There is nothing in the circumstances of the case which can justify the *Bank of Hindustan* in refusing to repay to him the money he paid them under this common mistake."

"It is perfectly plain that Mr. Alison has received nothing in consideration of the money he has paid and therefore it ought to be repaid him."

After the decision of this case two other stockholders made application to have the amounts paid by them in like manner, returned. But it now appeared that the dissenting stockholders of the Imperial Bank had been bought off and that the amalgamation agreement had been ratified. All the cases, including Alison's, came before the Court of Appeal in Chancery.

In re Bank of Hindustan, &c.
Campbell's Case.
Hippisley's Case.
Alison's Case.
L. R., 9 Ch. Ap., 1.

In regard to Campbell and Hippisley it was found that the amalgamation agreement and the proceedings under it having been ratified and validated, they, under the circumstances of their cases, were estopped from questioning the validity of the stock. Their cases are, in principle, much like the case of Delano *vs.* Butler, 118 U. S., where a subscriber to the increase of stock of the Pacific Bank was held by his conduct estopped from denying his liability.

Alison's case was affirmed (p. 24), Lord Selborne and Sir G. Mellish delivering opinion. It is said by the latter (p. 26):

"If he never became a stockholder it appears to me that he is clearly entitled to recover back the sums which he paid for the purpose of becoming a stockholder, upon the ground that they were moneys paid upon a consideration which has wholly failed."

The cases of

The American Tube Works *vs.* Boston Machine Co., 139 Mass., 5.
Reed *vs.* Boston Machine Co., 141 Mass., 454.

are also in point, as seems to be conceded by Judge Shipman. In these cases, as has been before set out, the Boston Machine Co. undertook to issue a special stock. It failed to obtain the necessary vote of its stockholders, and the stock issued was invalid. The plaintiffs subscribed and paid for certain shares of this stock, and received stock certificates for it, and afterwards received dividends upon it. After the insolvency of the Boston Machine Co., suits were tried to recover the amounts paid on the preferred stock. It was held that the plaintiffs could recover.

The corporation, say the Court, "has had the plaintiff's money, and has simply paid what is equivalent to interest upon it. No rights of third parties have intervened.

The consideration upon which the plaintiff parted with the money has failed. The defendant Issued special stock which was at the time supposed by both parties to be valid, but which was invalid. Under such circumstances an action lies to recover back the money."

Am. Tube Works *vs.* Boston Machine Co., 139 Mass., 11–12.

In the case of

Congress & E. Spring Co. *vs.* Knowlton, 103 U. S., 49,

money paid for shares to be issued without authority was recovered. The subscriber stood in exactly the

position in which Mr. Banigan stands now. He was a director in the company and suggested the scheme.

Anthony *vs.* Household sewing Machine Co., 16 R. I., 5 L. R. A., 575.

In the following cases the question arose as to the right of the subscribers to a proposed increase of stock in National Banks to recover the amounts paid after the insolvency of the corporations, the banks having failed to obtain the consent of the comptroller to such increase. The corporations failed to perform the condition which the Court found was implied in the subscription agreement, that is, that the Bank should issue to the subscriber genuine stock, and the consideration for the payments failed. It was therefore held in each of these cases that the subscriber was entitled to the amount he paid.

Winters *vs.* Armstrong, 37 Fed. R., 508.
Schieronburg *vs.* Stephens, 32 Mo Ap., 314.
Eaton *vs.* Pacific Bank, 144 Mass., 260.

Looking at the circumstances of the present case, it is clear that all that was done on either side was the result of a mistake. Both the corporation and the plaintiff in error believed that it was within the power of the former, either by an unanimous vote of its stockholders or in the manner provided by the statute for an increase of

ordinary stock, to issue valid preferred stock. It was for such general stock that the plaintiff in error subscribed, and for such he supposed he paid. But in fact, he received nothing which he bargained for. He received a certificate, it is true, but one which certified that he was the owner of spurious and invalid stock. There was no fraud on either side, but a mistaken belief in the existence of a state of facts which did not exist, to wit: the existence of a valid preferred stock.

If it is denied that there was a mistake of fact, or a mistake of fact as well as of law, and it be claimed that the mistake was purely of law, and that money paid under a mistake of law cannot be recovered, we reply that whatever the rule may be in other States, such is not the law in Connecticut.

In

Northrop *vs.* Graves, 19 Conn., 548,

the Courts establish the doctrine for this State. Church, Ch. J., in delivering the opinion says:

"In the present case, we establish no new principle, nor depart from any well settled doctrine of the common law. We do not decide, that money paid by a mere mistake in point of law, can be recovered back as if it has been paid by an infant, by a *feme covert*, or by a person after the statute of limitation, has barred an action, or when any other merely legal defense existed against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert, that when money is

paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of indebitatus assumpsit, whether such mistake be one of fact or of law; and this we insist, may be done, both upon the principle of *Christian* morals and the common law. And such only was the doctrine of the charge to the jury, in the present case. In such a case as we have stated, there can be no reasonable presumption that a gratuity is intended; nor is the maxim *Volenti non fit injuria*, at all invaded. The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives."

There is nothing in the present case to lead to the belief that Mr. Barrigan intended to make a gift of $17,550 to the Hayward Rubber Company; on the contrary, all the facts show that when he paid this money and received his stock certificate he believed that he was performing his duty in carrying out his subscription contract, and that he was receiving that which he bargained for, 702 shares of genuine preferred stock. That which the company gave him was invalid and worthless, and the corporation had no right, in good conscience, to retain the consideration received for it.

FOURTH.

The plaintiff in error has not, through any laches, lost his right to the recovery of the money paid.

Judge Shipman, in his opinion, says: "If he," the subscriber to preferred stock, "can recover the amount from the insolvent estate in a case where there is no claim of an unfulfilled condition, it is upon the theory of recission of the contract, because the stockholders have received nothing of value. American Tube Works *vs.* Boston Machine Co., *supra*; Green *vs.* Herrick, 15 Gray, 274. This recission must be within a reasonable time. In this case Mr. Banigan paid for his stock April 2d, 1885, and was still a stockholder when the receiver was appointed, August 4th, 1887."

Record, p. 18.

As to this we would respectfully point out—1st, that his honor neglects to give due weight to the assumption which he makes in deciding the case, namely, that the preferred stock was invalid. Making this assumption, it follows that Mr. Banigan, although in truth he had paid for preferred stock, never received it, and in respect to any preferred stock never was a stockholder. The doctrine that the right to rescind must be exercised within a reasonable time, does not apply, as, strictly speaking, there never was a contract between the parties. That which the party agreed to take and paid for, and the other party promised to deliver, never had any existence. The form which Mr. Banigan signed was—"We, the undersigned, herewith subscribe for the number of shares of the pre-

ferred stock of the Hayward Rubber Company, affixed opposite our names." But there was no such stock in existence, although the parties thought there was, and their minds therefore failed to meet. There was no contract to rescind, and the plaintiff in error is guilty of no laches in that respect.

Anthony *vs.* Sewing Machine Co. *supra.*

It is upon this principle that the Alison case, L. R., 15 Eq. Cas., 394, before cited, was decided. It has been universally held that a binding contract, in regard to a thing not in existence, cannot be consummated if the parties were ignorant of the fact, and the same rule applies where the thing having existed was, without the knowledge of the parties, destroyed at the time of the agreement.

Allen *vs.* Hammond, 11 Pet., 63, 71.
Walker *vs.* Tucker, 70 Ill., 527.
Conturier *vs.* Hastie, 5 H. L. C., 673.
Hammond *vs.* Allen. 2 Sumn., 396.

And so, when the thing contracted for and received proves entirely valueless, a return of it is not essential to the right of action for the purchase money. It was not necessary, in this case, for Mr. Banigan to tender the worthless certificate which he received.

Brewster *vs.* Burnett, 125 Mass., 68.
Kent *vs.* Bornstein, 12 Allen, 342.

In

Reed *vs.* Boston Machine Co., *supra,*

it was directly decided that the return of the worthless certificates was not necessary, and it was even held that the plaintiff need not return dividends received on the invalid stock before bringing suit. There had been no offer to rescind or to return the certificates of special stock or the dividends received thereon before the company went into insolvency, or before filing the claim for the return of money paid for the stock. Some of the stock in that case had been held two years.

In the case of American Tube Co. *vs.* Boston Machine Co. cited by Judge Shipman, the stock it was true was repudiated, and suit brought before the corporation went into insolvency, but as the Court say, the special stock might have been made good, so that the plaintiff would be content, or be bound to keep it," that is to say a repudiation of the stock was perhaps necessary where suit was to be brought against the corporation itself, because the corporation might perhaps have made its contract good. After insolvency, the claim being filed against the estate, recission is not necessary; as the Court say in Reed *vs.* Machine Co., "in the present case the time for doing this," that is validating the stock, "had passed. The stock was invalid, and nothing could be done by the corporation to make it valid. It was no longer possible to make the plaintiffs stockholders by estoppel. Under these circumstances there was no occasion for the plaintiffs to return their certificates of shares which were valueless; or the dividends which they had received, which were less

than the sums they were entitled to receive, the stock being and remaining invalid." And the Court distinguishes the case from the case of Allen *vs.* Herrick, 15 Gray, 274, also cited by Judge Shipman. It was held in that case that the plaintiff could not recover back the money he had paid for special stock assumed to be invalid, as money had and received, because he had not rescinded his contract. But the Court say, Allen *vs.* Herrick, 15 Gray, 284: "It was not a case where a party under a void contract had received in exchange for money only worthless paper or articles of no value. The plaintiff had received, under his contract with the corporation, moneys and notes which were of value. If he had seen fit to rescind the contract and to demand back the money which he had paid for the special stock, it would have been necessary for him to do some act declaring his purpose of recission, and also to surrender all that he had received under it, as a condition precedent to his right of action to recover back the money."

The difference between this case and the case of Allen *vs.* Herrick, is expressed in the first paragraph of the above quotation. This is "a case where a party under a void contract has received in exchange for money only worthless paper."

It is, therefore, claimed that under the facts of this case recission and return of the certificate was not a condition precedent to the right of action of the plaintiff in error.

2. But, conceding that such act was necessary on his part, and that he did not perform it until the company went into insolvency on August 9th, 1887, we claim that he was not, in this, guilty of laches.

Neglect cannot be imputed to the plaintiff in error until it be proved what time he first learned that the stock was worthless. This does not appear, and it is a fact which should have been proved and made to appear by the defendant in error, if he relies upon laches. When Mr. Banigan took the stock he believed it to be valid. When did he first know that it was not valid? If he did not learn this fact until after the insolvency of the company, and then at once repudiated the stock, he cannot be said to have been guilty of any laches.

Pence *vs.* Langdon, 99 U. S., p. 578.

3. But, again, conceding that Mr. Banigan had, or ought to have had, early knowledge of the invalidity of the stock, and that the Court will look at the facts to decide whether he exercised his right to rescind within a reasonable time, we respectfully submit that he did. Ratification will not be found in the mere lapse of time.

Charter *vs.* Trevelyan, 11 Cl. & F., 714.

The corporation was not placed in any worse position by the delay. It could do nothing to make the stock

good. Certainly, to allow the use of the money by the corporation was not an injury to it. No third persons were affected injuriously. The finding does not find that any third party has been in any way influenced by the delay. It is found that the action of the corporation was never made public. The joint-stock act provides for the publication of an increase of stock in several ways, by deposit of certificates, and annual reports in the respective offices of the Secretary of State and the Town Clerk; but none of those certificates were filed. None of the usual and legal means of publication were employed, and it may therefore be justly claimed that the public not only were not notified that there was a legal increase of stock, but knew from the state of the records of the Secretary of State that there was no increase of stock,

It is indeed shown that Mr. Banigan did, in a letter to certain note-brokers, speak of the preferred stock, and this is proof that, at the time, he believed the stock on list, and had no knowledge of its invalidity; but it is not found that anyone became a creditor, or was in any way influenced by that expression.

4. The fact that the claim of the plaintiff in error is made against the Receiver does not affect the merits of the case. The Receiver in this matter has no greater right than the corporation itself had. The claim of the Hayward Rubber Co. against the plaintiff in error being subject to the right of the plaintiff in error to make the set-off here claimed, he took his title subject to that right. The

rights and obligations growing out of this subscription rest upon contract and in respect to such matters the receiver stands precisely in the shoes of the corporation, and can only enforce what it could have enforced at the date of his appointment, and is subject, so far as the assets of the corporation are concerned, to the same obligations as the corporation would have been under had it never passed into his hands.

Palmer, Trustee, *vs.* Thayer, 28 Conn., 237.

Harding *vs.* The Mill Wollen Co., 34 Conn., 458.

Winters *vs.* Armstrong, 37 Fed. R., p. 521.

TILTON E. DOOLITTLE,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1354.

JOSEPH BANIGAN, PLAINTIFF IN ERROR,

vs.

CHARLES BARD, RECEIVER OF THE HAYWARD RUBBER COMPANY.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

This action was commenced by complaint under the common counts claiming $50,000. damages, brought to the Superior Court for New London County, in the State of Connecticut, by Charles Bard, Receiver of The Hayward Rubber Company, a Connecticut corporation, plaintiff, against Joseph Banigan, a citizen of Rhode Island, defendant, jurisdiction being obtained by personal service upon the defendant, in Connecticut, and was by the defendant removed to the Circuit Court of the United States for the District of Connecticut.

In the Circuit Court the plaintiff filed a substituted complaint

containing two counts: the first count alleging a cause of action for money had and received to and for the use of The Hayward Rubber Company by the defendant, before the appointment of the plaintiff as Receiver—such form of action being permitted by Sec. 1322, Gen. Statutes of Conn., which authorizes the Receiver to sue, either in his own name or in the name of the corporation; the second, for money had and received by the defendant to and for the use of the plaintiff as Receiver, after his said appointment.

To the substituted complaint the defendant filed his answer and counter-claim.

The bills of particulars filed by the plaintiff under the substituted complaint, and by the defendant under his counter-claim, do not discriminate between the amounts and items of account applicable under the first and second counts respectively; but the parties, by stipulation at the trial, agreed that the balance due to the plaintiff from the defendant under the first count of the substituted complaint, exclusive of the disputed items in the defendant's bill of particulars for services rendered to, and for money had and received in payment of preferred stock by The Hayward Rubber Company was $10,494.96, with interest, and that the balance due to the plaintiff from the defendant, under the second count, was $24,011 00, with interest.

Thus the balance due was determined, and the account stated under the second count; and upon the trial the sole contention was under the first count upon the claim of the defendant to recover for the above-mentioned disputed items, and to have any amount so found due set off against the balance of $10,494.96, and any excess recognized and established as a lawful claim against the corporation and its assets in the hands of the Receiver.

The Court rendered judgment for the plaintiff to recover the stipulated balance under the second count; found the amount due to the defendant from the insolvent corporation for services to be in excess of the stipulated balance under the first count to which it was a proper set-off, and found the defendant not entitled to have his claim for money paid for preferred stock established as a valid claim against the assets in the hands of the Receiver. To the rulings

of the Circuit Court, upon the last mentioned subject, the defendant duly excepted and removed the record by writ of error to this Court.

The only question involved arises under the first count, and upon the claim of the plaintiff in error, stated in the first paragraph of his bill of exceptions:

"That upon the facts as found and the evidence in the case, and "under the pleadings in the case, the defendant is entitled to set off "the amount of $17,550, paid by him upon his subscription to the "preferred stock of the said Hayward Rubber Company, with law- "ful interest thereon, against any such indebtedness as is found due "from him to said corporation, and to recover any balance due to "him after making such set-off, or to have such balance recognized "and established as a lawful claim against such corporation and "its assets in the hands of the Receiver."

So far as is material to the question at issue, the facts found by the Court are briefly as follows:

The Hayward Rubber Company was a joint stock corporation, duly incorporated in accordance with the statutes of Connecticut, and located at Colchester, Connecticut, having a capital stock of $400,000, divided into 16,000 shares of the par value of $25 each. In 1883, the plaintiff in error became the owner of 4,000 shares of the stock, and was appointed general manager and agent of the company, and continued such until the company went into the hands of a Receiver, on August 9, 1887.

In March, 1885, a committee of the directors, of which committee the plaintiff in error was a member, sent a circular to the stockholders recommending an increase of the capital by the issue of preferred stock to the amount of $100,000, calling a stockholders' meeting to be held on March 25, 1885, inclosing the proposed reso-

lutions, expressing the desirability of an unanimous vote, and asking for proxies.

At said meeting the stock was increased $100,000, by the authorization of the issue of preferred stock by the unanimous vote of the shares present or represented, being 13,404 shares of the entire 16,000.

Of the issue of $100,000, there was subscribed $25,000, of which the plaintiff in error subscribed and paid for 702 shares, for which he paid par, or $17,550, to the company, and received a certificate for his shares. One stockholder of record brought a petition for an injunction against the issue of said preferred stock, but discontinued or withdrew it. No certificate of the increase of capital was filed in the office of the Secretary of State, or of the town clerk of Colchester.

The plaintiff in error continued to hold his preferred stock, and made no claim for the repayment of the sum paid by him therefor, until 1888, and after the appointment of the Receiver.

It is further found that he was one of the promoters of the scheme for the issue of preferred stock, urged his co-stockholders to buy, voted upon it at one or two annual meetings of the stockholders; and, for the purpose of favorably explaining the company's position to the firm which was to take and negotiate its paper, in June, 1885, enclosed to such firm a statement of its affairs, and saying that the company had arranged to issue $100,000 of preferred stock, of which only one-quarter had yet been issued, which he himself had taken principally.

Upon these facts, the plaintiff in error claimed, as matter of law, as set forth in the second paragraph of the bill of exceptions:

"That the said corporation had no power to create preferred "stock, and that upon the facts, as proved and found, said acts of "said corporation, in attempting to create preferred stock, were en- "tirely void, and that the said Banigan had a valid and legal claim "against the corporation for the amount by him paid on said stock "which could properly be set off as hereinbefore set forth, and that "the said Banigan was not chargeable with laches in not presenting

" his claim against said corporation for said preferred stock prior " to the appointment of a Receiver."

POINTS.

I.

Assuming that the issue of preferred stock was invalid, the defendant in error contends that the plaintiff in error is nevertheless estopped from setting up such invalidity against the Receiver.

Whatever invalidity may attach to this increase of stock from the manner in which or the terms upon which it was issued, it was not void or illegal in its inception, nor unauthorized or beyond the powers of the corporation to create.

The statutes of Connecticut in force at the time when this increase was made permit such increase.

The act provides:

" Every such corporation may increase or reduce its capital, and " the number and par value of its shares therein, at any stockhold- " ers' meeting especially warned for that purpose, by a vote of the " stockholders holding at least two-thirds of the whole stock, and " certificates of the increase or reduction of said capital, or the num- " ber or value of said shares shall be made, filed and recorded as " provided in this act for original stock."

General Statutes of Conn., §1954.
Acts of 1880, Cap. 97.

The increase in question is found to have been made at a stockholders' meeting specially warned for that purpose, by a vote of the stockholders holding more than two-thirds of the whole stock, to wit: 13,404 shares out of 16,000.

The increase was therefore legal and within the powers of the corporation, unless the vote to prefer the shares thus authorized made the action of the corporation void *ab initio*.

The statutes of Connecticut nowhere prohibit, nor do they expressly authorize the issue of preferred stock by a corporation, either up

on organization or by an increase of stock. Is it required then that such issue be of common stock only?

It is well settled by authority that unless there be something in the laws of the State under which the corporation is organized or created, a company may issue preferred stock;

1. When the articles of association provide therefor.

1 Morawetz, Private Corporations, 464.
Kent v. Quicksilver Mining Co., 78 N. Y., 178.
Harrison v. Mexican Ry. Co., L. R. 19 Eq. Ca., 358.
In re Bridgewater Nav. Co., L. R. 39 Ch. Div., 8.
In re South Durham Brewery Co., L. R. 31 Ch. Div., 272.

2. If the existing shareholders unanimously give their consent to such issue.

1 Morawetz, Private Corporations, 464.
Kent v. Quicksilver Mining Co., 78 N. Y., 184.
Beach, Joint-Stock Act of Connecticut, 25.

In the case of The Hayward Rubber Company the increase by the issue of preferred shares was assented to by the precedent vote of all the shares present, or represented at the meeting, more than thirteen-sixteenths of the whole, and by the subsequent assent of everybody. The Circuit Court has found that one holder of stock subsequently brought a petition for an injunction against the issue of preferred stock, but discontinued or withdrew said petition. In respect of that stockholder the waiver is complete, for it was the voluntary relinquishment of a known right.

The assent of the stockholders need not be express, nor need it precede the issue of the preference shares.

Such assent is as certainly binding when evidenced by the continued acquiescence in the corporate act, and neglect to condemn it and to seek judicial redress after knowledge of the committal of it.

Kent v. Quicksilver Mining Co., 78 N. Y., 159.
Sheldon H. B Co. v. Eickmeyer H. B. M. Co. 90 N. Y., 613

3. The reason assigned for the invalidity of preferred stock, issued without the unanimous consent of the stockholders is, that it impairs the existing equality between stockholders.

This objection is obviated if, as in the case at bar, the right to retire the preferred shares, upon payment of the money advanced, is reserved by the corporation.

West Chester, &c., R. R. Co. *vs.* Jackson, 77 Pa. St., 321.

We submit, therefore, that the issue of preferred stock by an existing Connecticut corporation is not *per se* illegal and void under Connecticut statutes.

Conceding that there can be no ratification of or acquiescence in an increase of stock, which is primarily illegal and void, so that the holder thereof would be estopped from asserting the invalidity, the same thing is not predicable of shares which the company had power to create, although not in the manner in which, or upon the terms upon which, they have been issued.

This distinction is carefully drawn by this Court, in Scovill *v.* Thayer, 105 U. S., 149, in distinguishing that case from Chubb *v.* Upton, 95 U. S., 665.

In the latter case, the stockholder was held estopped by his conduct and by acquiescence in and failure to rescind his contract of subscription from setting up the irregularity of the issue.

To the same effect are :

Veeder *v.* Mudgett, 95 N. Y., 295.
Kent *v.* Quicksilver Mining Co., 78 N. Y., 159.
Upton *v.* Jackson, 1 Flippin, 413.

In Chubb *v.* Upton, 95 U. S., 665, the stockholder paid money on his stock, took a certificate, took part in meetings, and at one time gave a proxy on his shares.

In Veeder *v.* Mudgett, 95 N. Y., 295, the stockholder voted for the increase, accepted his share of the additional stock, and received dividends thereon.

In Upton *v.* Jackson, 1 Flippin 413, the stockholder paid repeated assessments, in person and by proxy took part in meetings of stockholders and continued to hold the stock a year or more.

In the case at bar, the plaintiff in error was a promoter of the scheme to increase the capital by the issue of preference shares, urged his co-stockholders to buy, subscribed for the stock, paid for it and received the certificate of his shares, held his shares from April 2, 1885, never attempted to rescind the contract until some time in 1888, and voted upon the shares at stockholders' meetings. He was aware of "the desirability of an unanimous vote," and after the issue, knowing all the facts, as the agent and manager of the company, he set forth to the note brokers as a basis of strength and credit the very issue of stock which he now attacks as illegal and void. He is found to have been the virtual creator of this stock, and as is forcibly stated in the finding: "If a stockholder could be estopped, Banigan would necessarily be."

The language of this Court in Chubb *v.* Upton, 95 U. S., 669, is peculiarly applicable here:

"All this does not alter the fact that there was an attempted alteration of the company under the forms of law, approved by the Attorney General, with an increased capital, in the organization and management of which the defendant took part; that he paid his money, received his certificate of stock, attended meetings, voted, acted as an officer, and, so far as the record shows, never repudiated his position at any time, even to the time of trial. If successful, he would have shared in its profits. He may have been the dupe and victim of the action of others. He may have been an accomplice. At all events he was so far an actor in the affair, that he cannot escape the consequences of his position."

II.

While it is assumed for the purposes of this case, by the learned Judge before whom the trial was had, that the issue of preferred stock in question was invalid, it is contended by the defendant in error that such issue was valid, legal and binding upon the corporation.

If it is invalid, such invalidity must depend upon the fact:

1. That the unanimous consent of all the stockholders was not affirmatively expressed.

2. That the full amount of the increased stock was not subscribed.

3. That the certificates, required by law, were not filed in the office of the Secretary of State, and of the town clerk of Colchester, where the corporation was located.

1. The first of these matters is discussed at length in Kent *v.* Quicksilver Mining Co., 78 N. Y., 184, where the Court say:

"But there remains a serious question, whether, though there "was at the outstart a minority of the stockholders who gave no "assent to the corporate act, there has not been such tacit acqui- "escence and delay in action by that minority as to amount to inde- "fensible *laches* and estoppel upon those who constituted it and "their assigns. In our judgment there has, and we find here a safe "place on which to rest our decision of these cases. The findings "show that the by-laws empowering the creation and issue of the "preferred stock were authorized at a stockholders' meeting, regu- "larly called and conducted; that the stock was at once offered for "subscription to all of the stockholders; that a circular informing "thereof was issued by authority and distributed to the stockhold- "ers; that though all of them did not avail themselves of the "chance to take it, it was not because the chance was not known; a "large number of them did subscribe, and paid money for the "privilege to the corporation, and that money went into the assets "and business of the company; certificates of the preferred stock "were thereupon issued, and it, as well as the common stock, was "dealt in by the public; sales were made of the two kinds openly "at the stock exchange, at prices for one larger than for the other, and "quoted in the daily public prints; and from year to year, for four "years, the annual reports of the directors to the stockholders spoke "of the two kinds of stock. There was ample knowledge or "means of knowledge, on the part of all stockholders, of the action "of the corporation in the creation of the two kinds of stock, of the "issue of certificates for the preferred stock, of the entry of that "stock into the channels of trade, of the public dealings in it at the "especial marts for the sale of such property, and of the continued

The authorities upon this point are to the effect that an increase of the capital stock of an existing corporation need not be fully subscribed to be valid and binding upon the subscribers.

1 Morawetz, Private Corporations, 142.
Clarke v. Thomas, 34 Ohio St., 46.

"A subscription to an increase of capital stock manifestly differs "from a subscription to the original stock in this, that the sub- "scriber is dealing with a corporation already organized and doing "business, and it has been said that there is no implied condition "that the whole number of the new shares created shall be sub- "scribed for or issued. But whether there is an implied condition "attached to a subscription for new stock depends upon the contract "of subscription, construed with reference to the law and the facts "under which it is made, and this is to be determined in the same "manner and upon the same principles, in subscriptions for new "stock as in subscriptions for original stock. See *Charleston v.* "*Peoples National Bank*, 5 S. Car., 103. In the common case of a "corporation, authorized to create new stock by a vote of its stock- "holders or directors, the stock is created by the vote. In the ab- "sence of any statute prescribing how it shall be disposed of, it may "be allotted among the stockholders, or it may be sold from time to "time as the corporation needs money. It may be sold by subscrip- "tion, and the stockholders may be entitled to a preference in sub- "scribing, and they may sell their rights. If the law requires that "the new stock may be paid for at par before it is issued, this must "of course be done; but unless a statute or a by-law requires "that the new stock shall all be subscribed for before it is created "or issued, there is no implied condition that all the stock created "shall be subscribed for or issued. The increase of the capital "stock is fixed by the vote, and the corporation is left to dispose of "the new stock as it can, according to law. *Nutter v. Lexington &* "*West Cambridge Railway*, 6 *Gray*, 85.

Eaton v. Pacific Nat. Bank, 144 Mass., 275.

See also:

Veeder v. Mudgett, 95 N. Y., 311.

And in Winters *v.* Armstrong, 37 Fed. Rep., 513, Judge Jackson while holding that the rule applicable to original subscriptions, applies also to an increase of capital stock when the proposed increase is fixed and designated, concludes as follows:

"Subscribers may, however, waive performance of this condition, "and in some of the cases it is held to be waived when the subscriber, knowing that the whole amount of such capital stock has never "been subscribed for, nevertheless participates in the affairs of the corporation in a manner which would have been proper only on the "assumption that the shareholders intended to carry on business "with the stock but partially subscribed."

3. The clause of the statute relating to the filing of certificates with the Secretary of State and town clerk, is directory merely, and is not a condition precedent to the validity of the increase.

Veeder *v.* Mudgett, 95 N. Y., 295.
Merrick *v.* Reynolds Engine & Governor Co., 101 Mass., 381.

For these reasons, it is respectfully submitted that as between all the stockholders of the corporation the issue of preferred stock was valid and binding upon the holders thereof, irrespective of any question of estoppel which might arise between such holders and the creditors of the corporation.

III.

Whether such issue of preferred stock was valid or invalid, the holder thereof is not entitled to have the money paid for it repaid to him *pro rata* out of the assets of the company. The payment was a voluntary one, made with full knowledge of all the facts and the terms and conditions upon which the subscription was made have been fully complied with by the corporation. The contest here is between a stockholder and the Receiver of an insolvent corporation.

Such Receiver is the representative of all the creditors of the corporation, and upon the facts found, were the Receiver suing such stockholder to recover for an unpaid balance of his subscription, the defence of irregular organization could not avail.

Chubb *v.* Upton, 95 U. S., 665.